

Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

Abstract

Gen. No. 10501

Agenda No. 11

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

345 I.A. 82

May Term, A. D. 1951

BLANCHE RATH, BERNICE RATH
STADLER, and LORAINÉ
HENNESSEY,

Plaintiffs-Appellees,

vs.

WILLIAM R. SCHNEIDER and
HURSHÉL JOHNSON,

Defendants-Appellants.)

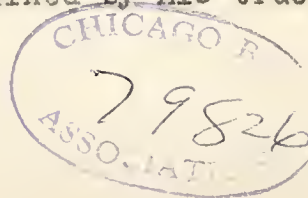
Appeal from the

Circuit Court of

Kane County, Illinois.

Dove, J.

Blanche Rath, Bernice Rath Stadler, and Loraine Hennessey, who are sisters, brought this action in the Circuit Court of Kane County to recover for personal injuries sustained by Blanche Rath and Bernice Rath Stadler and for property damage sustained by Loraine Hennessey against William R. Schneider and Hurshel Johnson. The defendants filed counterclaims for damages claimed to have been sustained by them. The controversy grows out of an accident involving a Plymouth automobile owned by Loraine Hennessey and driven by Bernice Rath Stadler and a Ford truck owned by the defendant Schneider and being driven by his employee, the defendant Johnson. Defendant Schneider's Counterclaim was for property damage sustained by his truck in



JAN 11 1962

BOUND.....

RECEIVED

U.S. DISTRICT COURT

NOV 1961

IN THE

U.S. DISTRICT COURT OF ILLINOIS

SECOND DISTRICT

345 I.A. 82

Nov Term, A. D. 1961

<p>Appeal from the Circuit Court of Kane County, Illinois.</p>	<p>Plaintiffs-Appellees, vs. WILLIAM A. SCHNEIDER and HURSHAL JOHNSON, Defendants-Appellants.</p>
--	---

Dove, J.

Blanche Hall, Gertrude Hall, and Lorraine
Hennessey, who are sisters, brought this action in the Circuit
Court of Kane County to recover for personal injuries sustained
by Blanche Hall and Gertrude Hall and for property
damage sustained by Lorraine Hennessey against William A. Schneider
and Hurshal Johnson. The defendants filed counterclaims for
damages claimed to have been sustained by them. The controversy
grows out of an accident involving a Plymouth automobile owned
by Lorraine Hennessey and driven by Lorraine Hall and a
Ford truck owned by the defendant-schneider and later driven by
his employee, the defendant Johnson. Defendant-schneider's
counterclaim was for property damage sustained in his truck in

the accident, and defendant Johnson's counterclaim was for personal injuries sustained by him. A trial by jury resulted in verdicts in favor of the plaintiff Blanche Rath in the sum of \$7500.00, in favor of plaintiff Bernice Rath Stadler in the sum of \$300.00, and in favor of plaintiff Loraine Hennessey in the sum of \$700.00. The jury returned verdicts of not guilty as to the counterclaims. Motions were made by the defendants for judgment notwithstanding the verdicts and for a new trial. These were overruled, and the court entered judgments on the verdicts in favor of plaintiffs and against the defendants, and the defendants prosecute this appeal.

The record discloses that about six-thirty o'clock on the morning of November 3, 1945, the plaintiff Bernice Rath Stadler was driving her sister's automobile in an easterly direction on what is known as Big Timber Road, and the defendant Johnson was driving the defendant Schneider's empty one and one-half ton gravel truck in a northerly direction on a road known both as Schneider Road and McQueen Road and which we shall refer to herein as Schneider Road. There was a collision between the vehicles at the point where Schneider Road intersects Big Timber Road. The evidence tended to show that the left front part of the truck came into contact with the front end and right side of the Plymouth automobile. Both vehicles were severely damaged, and the plaintiffs Blanche Rath and Bernice Rath Stadler and defendant Johnson received personal injuries as a result of the collision.

Big Timber Road runs in an easterly and westerly direction. It is a blacktop asphalt surfaced state aid road, twenty feet wide and has been designated as a through highway by resolution of the

the accident, and defendant Johnson's counterclaim was for personal injuries sustained by him. A trial by jury resulted in verdicts in favor of the plaintiff for the sum of \$2500.00, in favor of plaintiff for the sum of \$500.00, and in favor of plaintiff for the sum of \$700.00. The jury returned verdicts of not guilty as to the counterclaim. Motions were made by the defendant for judgment notwithstanding the verdicts and for a new trial. These were overruled, and the court entered judgments on the verdicts in favor of plaintiff and against the defendant, and the defendant presented this appeal.

The record discloses that about six-thirty o'clock on the morning of November 5, 1945, the plaintiff for the State was driving her sister's automobile in an easterly direction on what is known as 1st Street, and the defendant Johnson was driving his automobile in a westerly direction on the same street. The two vehicles were traveling in opposite directions on a road known both as 1st Street and Johnson Road and which we shall refer to herein as Johnson Road. There was a collision between the vehicles at some point west of the intersection of 1st Street and Johnson Road. The evidence tends to show that the left front part of the truck came into contact with the front end and right side of the plaintiff's automobile. Both vehicles were severely damaged, and the plaintiff received personal injuries as a result of the collision. The State's case is an easterly and westerly collision. It is a photograph which showed the state and road, showing that the car had been damaged as a result of the collision of the

Board of Supervisors of Kane County. Schneider Road is a gravel road about fifteen feet wide. This road does not cross Big Timber Road but intersects it from the south. To the east of the junction of Schneider Road with Big Timber Road, the highway is straight and level. To the west of this intersection, it is also level for about 200 feet and then rises gradually to an elevation of about 10 feet. The crest of this elevation is approximately 600 feet from the place of the accident. Schneider Road is level in its approach to Big Timber Road except for a very slight incline in the last thirty to forty feet. There is a stop sign at the southeast corner of Schneider Road about 25 feet south of Big Timber Road, which stop sign was placed there under the supervision of the Kane County Highway Superintendent. The evidence shows that there were no obstructions to the vision at this intersection for a distance of some five hundred to six hundred feet in either direction, although a vehicle could not be seen to the west of the crest of the hill.

On the morning of the accident the weather was dry and clear with the sun shining at a low altitude. Bernice Rath Stadler was driving the Plymouth automobile belonging to her sister Loraine Hennessey. She was accompanied by Blanche Rath, and they were going to their respective places of employment in the City of Elgin. As was their custom, they used their sister's car as a means of transportation to and from their work and divided the expense thereof for gas and oil. In addition, the plaintiff, Bernice Rath Stadler, at the request of the plaintiff Loraine Hennessey, upon the morning in question, was taking the car to a garage in Elgin for some repairs. The evidence does not

Board of Supervisors of Kane County. Timber Road is a gravel road about fifteen feet wide. This road does not cross Big Timber Road but intersects it from the south. To the east of the junction of Timber Road with Big Timber Road, the highway is straight and level. To the west of this intersection, it is also level for about 200 feet and then rises gradually to an elevation of about 10 feet. The crest of this elevation is approximately 500 feet from the place of the accident. Timber Road is level in its approach to Big Timber Road except for a very slight incline in the last thirty to forty feet. There is a stop sign at the southeast corner of Timber Road about 25 feet south of Big Timber Road, which stop sign was placed there under the supervision of the Kane County Highway Commissioner. The evidence shows that there were no obstructions to the vision at this intersection for a distance of some five hundred to six hundred feet in either direction, although a vehicle could not be seen to the west of the crest of the hill.

On the morning of the accident the weather was dry and clear with the sun shining at a low altitude. The road was straight and level for a distance of some five hundred to six hundred feet in either direction, although a vehicle could not be seen to the west of the crest of the hill. The evidence shows that there were no obstructions to the vision at this intersection for a distance of some five hundred to six hundred feet in either direction, although a vehicle could not be seen to the west of the crest of the hill.

clearly indicate the extent or nature of these repairs, but the car was to be taken to a garage specializing in wheel alignment, and it was conceded by the plaintiffs at the trial that the car commenced to "shimmy" when driven at a speed of more than forty miles per hour. ✓

The defendant Johnson had just left the home of his employer prior to the accident and was following another gravel truck owned by defendant Schneider's son, Edward Schneider, and which was being operated by Harry Satterwaite. The first truck had turned west at the intersection, and the defendant Johnson approached this intersection with the intention of following him. The evidence is conflicting as to whether the defendant Johnson came to a stop at this stop sign. The plaintiffs who were riding in the car, Blanche Rath and Bernice Rath Stadler, testified that he did not stop before entering Big Timber Road. Defendant Johnson testified that he came to a complete stop at the sign and, after looking both to his left and to his right and seeing no traffic, shifted gears and turned sharply to his left and onto Big Timber Road while travelling at a speed of about five miles per hour. The defendant Johnson stated that he first saw plaintiffs' car about two hundred feet west of the intersection and that he immediately applied his brakes and brought the truck to a stop within three feet and with the front wheels only two or three feet out onto Big Timber Road. ✓

The plaintiff Bernice Rath Stadler testified that she was driving at a speed of approximately thirty or thirty-five miles per hour and that she remembered passing a truck on the hill to the west of the intersection some three hundred or four

clearly indicate the extent of these repairs, but the car was in good to a garage specializing in wheel alignment, and it was completed by the plaintiff at the trial that the car was damaged by "adverse" work done at a speed of more than forty miles per hour.

The defendant Johnson has just left the home of his brother-in-law to the plaintiff and was following another Greyhound truck owned by Johnson's brother, Edward Johnson, and which was being operated by Harry Jettawater. The first truck had turned east on the intersection, and the defendant Johnson approached this intersection with the intention of following him. The evidence is conflicting as to whether the defendant Johnson came to a stop at this stop sign. The plaintiff who was driving in the car, Thomas Ruth and Gertrude Ruth stated, testified that he did not stop before entering Big Timber Road. Defendant Johnson testified that he came to a complete stop at the sign and, after looking left to his left and to his right and seeing no traffic, shifted gears and turned sharply to his left and onto Big Timber Road while traveling at a speed of about five miles per hour. The defendant Johnson stated that he first saw plaintiff's car about two hundred feet west of the intersection and that he immediately applied his brakes and brought the truck to a stop within three feet and with the front wheels only two or three feet out onto Big Timber Road.

The plaintiff Thomas Ruth stated, testified that she was driving at a speed of approximately thirty or thirty-five miles per hour and that she remembered passing a truck in the left lane of the intersection some three hundred or four

hundred feet from the intersection. She testified that she did not see the truck being operated by the defendant Johnson until she was approximately twenty to forty feet from the intersection at which time the truck was about nine or ten feet south of the stop sign at the intersection and that the truck did not stop but continued into the intersection. She testified that she attempted to put on her brakes and turn away but did not have sufficient time. The plaintiff Blanche Rath, who was riding in the front seat of the Plymouth with her sister, corroborates her sister's statement as to the speed at which the car was being driven and states that she observed the truck driven by defendant Johnson when the car in which she was riding was some four hundred to five hundred feet from the intersection, at which time she estimates the truck was about the same distance from the intersection on the gravel road travelling north. She further stated that she did not see the truck again until after the accident. As a result of the impact, the plaintiff, Bernice Rath Stadler, was thrown into the back seat and sustained bruises and lacerations about her legs and face and her back was injured slightly. The plaintiff Blanche Rath was thrown against the front windshield, and her right leg was pinned beneath the heater. She had bruises on her head and chest and comminuted fractures of the right tibia and fibula. She was in the hospital for about forty days and had a cast on her right leg for a period of about ten weeks.

It is insisted by appellants that the plaintiff Bernice Rath Stadler was guilty of contributory negligence as a matter of law. We have read the evidence as abstracted, and it is our conclusion that Bernice Rath Stadler was not guilty of contributory

hundred feet from the intersection. She testified that she did not see the truck being operated by the defendant Johnson until she was approximately twenty to forty feet from the intersection at which time the truck was about nine or ten feet south of the cross sign at the intersection and that the truck did not stop but continued into the intersection. She testified that she attempted to get on her knees and turn away but did not have sufficient time. The plaintiff, Bernice Jones, who was riding in the front seat of the Plymouth with her sister, corroborates her sister's statement as to the speed at which the car was being driven and stated that she observed the truck driven by defendant Johnson when the car in which she was riding was some four hundred to five hundred feet from the intersection, at which time she estimated the truck was about the same distance from the intersection on the gravel road traveling north. She further stated that she did not see the truck again until after the accident. As a result of the impact, the plaintiff, Bernice Jones, was thrown into the back seat and sustained bruises and lacerations about her legs and face and was injured slightly. The plaintiff, Bernice Jones, was thrown against the front windshield and her right leg was struck beneath the bumper. She had bruises on her head and nose and sustained lacerations of the right side of her face. She was in the hospital for about three days and had a cast on her right leg for a period of about ten weeks. It is insisted by appellee that the plaintiff Bernice Jones should see fully of contributory negligence as a matter of fact. We have read the evidence as presented, and it is our conclusion that Bernice Jones was not guilty of contributory

X negligence as a matter of law. Whether she was guilty of contributory negligence was properly submitted to the jury as an issue of fact to be decided by the jury. (Ritter v. Nieman, 329 Ill. App. 163; McDonald v. Stiner, ^{97 N.E. 2d, 573} 342 Ill. App. 651.) The trial court and jury heard all of the evidence. The jury returned verdicts against the defendants and these verdicts have been approved by the trial court. We would not be justified in setting aside these verdicts and substituting our judgment for that of the jury. (McDonald v. Stiner, ^{97 N.E. 2d, 573} 342 Ill. App. 651.)

It is also insisted by counsel for appellants that the court erred in giving the following instruction: "The Court instructs the jury that a law in the State of Illinois, in full force and effect at the time and place of the occurrence in question, provided that the County of Kane in its discretion and when traffic conditions warranted such action, could designate through highways, on a highway under its jurisdiction and cause to be erected a stop sign on entrance thereto, and could designate an intersection as a stop intersection by erecting proper stop signs at one or more entrance to such intersection, and that where such stop sign or stop signs were so erected, then vehicles entering such through highway were to come to a full stop as near to the right of way line of such through highway as possible and regardless of direction were to give the right of way to vehicles upon such through highway. And if you find from a preponderance of the evidence that Big Timber Road was through highway under this law and that there was a stop sign on the Southerly side of said Big Timber Road against traffic approaching the intersection in question along Schneider Road from the South, and if you

negligence on a matter of law. Whether and what matter of law
testimony negligence was properly submitted to the jury is an
issue of fact to be decided by the jury. (Fisher v. Ligon, 202
Ill. App. 3d 100; ^{87ME.24,273} ~~202 Ill. App. 3d 100~~; ^{87ME.24,273} ~~202 Ill. App. 3d 100~~) The trial
court and jury heard all of the evidence. The jury returned
verdict against the defendant and found defendant liable for
negligence. The trial court would not be permitted in setting
aside the verdict and submitting the issue to the jury for
the jury. (Fisher v. Ligon, 202 Ill. App. 3d 100; ^{87ME.24,273} ~~202 Ill. App. 3d 100~~)
It is also insisted by counsel for defendant that the
court erred in giving the following instruction: "The court
instructs the jury that a law in the State of Illinois, in full
force and effect at the time and place of the occurrence in
question, provided that the amount of time in the direction and
when certain conditions warranted such action, could designate
through highway, in a highway where the intersection and cross
to be erected a stop sign or entrance thereof, and could designate
an intersection as a stop intersection by erecting either stop
sign at one or more entrances to such intersection, and that
where such stop sign or stop signs were so erected, that vehicles
entering upon such highway were to come to a full stop as near
to the right of way line of such highway as possible and
remained of direction were to give the right of way to vehicles
upon such highway rightway. And it was the duty of a driver
of the vehicle that the driver had been upon a highway under
this law and that there was a stop sign on the highway side of
said highway and against certain traffic upon such intersection
in question, and defendant had from the court, and it was

further find from such evidence that the defendant Hershel Johnson, failed to bring the truck driven by him to a full and complete stop as near the right of way line of the said Big Timber Road as was possible, or that he failed to give the right of way to the automobile driven by the plaintiff, Bernice Rath Stadler, along and upon said Big Timber Road and that such failure was negligence on the part of the said defendant and that if you further find that such negligence on the part of the said defendant proximately caused the collision in question and that a plaintiff was at and immediately prior to the time in question, in the exercise of due care and caution for her own person, and that of her property, then such plaintiff can recover in this case."

It is insisted that it was error to give this instruction because it fails to include such necessary elements as the speed of the vehicles involved in the collision and also fails to include the distances the respective vehicles involved in the collision were from the intersection. In the instant case the intersection of Schneider road with Big Timber highway had been designated a stop intersection. Under circumstances where no stop sign is involved, Section 165 of the Illinois Motor Vehicle Act (Ill. Rev. Stat. 1949, Chap. 95 $\frac{1}{2}$, sec. 165) is applicable and the elements of distance and speed must be considered, but here vehicles traveling Big Timber Road were given preference as provided by Section 167 of the Motor Vehicle Act. (Ill. Rev. St. 1949, Chap. 95 $\frac{1}{2}$, sec. 167).

In Hill v. Hilles, 309 Ill. App. 321, which involved the question of a failure to stop at a stop sign, the court said

further find from such evidence that the defendant, Johnson, failed to bring the truck driven by him to a full and complete stop as near the right of way line of the said Big Timber Road as was possible, or that he failed to give the right of way to the automobile driven by the plaintiff, Terence Math Stabler, along and upon said Big Timber Road and that such failure was negligence on the part of the said defendant and that if you further find that such negligence on the part of the said defendant proximately caused the collision in question and that a plaintiff was at and immediately prior to the time in question, in the exercise of due care and caution for her own person, and that of her property, then such plaintiff can recover in this case.

It is insisted that it was error to give this instruction because it fails to include such necessary elements as the speed of the vehicles involved in the collision and also fails to include the distances the respective vehicles involved in the collision were from the intersection. In the instant case the intersection of Schneider Road with Big Timber Highway had been designated a stop intersection. Under circumstances where no stop sign is involved, Section 105 of the Illinois Motor Vehicle Act (Ill. Rev. Stat. 1949, Chap. 95, sec. 105) is applicable and the elements of distance and speed must be considered, but here vehicles traveling Big Timber Road were given preference as provided by Section 107 of the Motor Vehicle Act. (Ill. Rev. Stat. 1949, Chap. 95, sec. 107).

In Hill v. Hill, 309 Ill. App. 321, which involved the question of a failure to stop at a stop sign, the court said

that if the defendant did not come to a stop before entering the intersection as required by section 167 of the Motor Vehicle Act (Ill. Rev. St. 1949, Chap. 95¹/₂) then he violated that section, and a violation of a statute prescribing a duty for the protection and safety of persons is prima facie evidence of negligence if such violation caused or contributed to cause the injury, and whether the alleged negligence of defendant in not so stopping was the proximate cause of the injury was a *question* of fact for the jury and held that under the facts disclosed in that case section 167 of the Motor Vehicle Act governed and section 165 of the same Act had no application.

In *Ritter v. Nieman*, 329 Ill. App. 163, at page 171, this court said that the operator of a motor vehicle when he stops at a preferred highway should ascertain if he can proceed safely across such highway. If he cannot, he should not enter it because a stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare. In *Wachsmuth v. Flanagan*, 335 Ill. App. 311, a collision of two automobiles occurred at the intersection of Dempster Street and Asbury Avenue in Evanston. Dempster street was a protected highway. In that case the court instructed the jury that while the law gives the right of way to vehicles driven on a through street, it does not contemplate that such right of way will arise when the vehicle on a through street is so far from the intersection at the time the other vehicle enters said through street that with both vehicles travelling within lawful limits of speed the vehicle so entering the through street will reach the line of

that if the defendant did not come to a stop before entering
the intersection as required by section 107 of the Motor Vehicle
Act (Ill. Rev. Stat. 1943, Chap. 95) then he violated that section
and a violation of a statute prescribing a duty for the protection
and safety of persons is prima facie evidence of negligence in
such violation caused or contributed to cause the injury, and
whether the alleged negligence of defendant is not an operating
was the proximate cause of the injury was a question of fact for
the jury and held that under the facts disclosed in that case
section 107 of the Motor Vehicle Act governed and section 108 of
the same Act had no application.

In *Alford v. Alford*, 253 Ill. App. 103, 82 page 171
this court said that the operation of a motor vehicle when he stops
at a red light is a duty which it is his duty to perform safely
across such light. If he cannot, he should not enter it because
a stop sign is a challenge to negotiate to stop at a point where,
by the use of one's judgment, one can safely negotiate it.
He can safely proceed into the prohibited intersection. In
Wasson v. Thompson, 253 Ill. App. 211, a collision of two
automobiles occurred at the intersection of Madison Street and
Madison Avenue in Chicago. Defendant's car was a protected high-
way. In that case the court instructed the jury that while the
law gives the right of way to vehicles traveling on a through street,
it does not contemplate that such right of way will arise when
the vehicle on a through street is so far from the intersection
as to give the other vehicle notice and thereby assert that
with both vehicles traveling against traffic on equal terms
vehicles so entering the through street will cross the line of

crossing before the other vehicle will reach the intersection. This court held that that instruction should not have been given because it emphasized the importance of the right of way and overlooked the duty of the driver of the car entering the through street not only to stop before entering the intersection, but having stopped, not to proceed into the intersection until he could do so safely. In the instant case there was no error in giving this instruction in view of the evidence found in this record.

It is finally insisted that the trial court erred in sustaining objections to questions propounded to Dr. Kaiser offered to rebut the evidence of one of the plaintiffs' medical witnesses. Dr. Lyman Smith testified that the injury which the plaintiff Blanche Rath had received to her ankle in the accident was a permanent injury accompanied by pain and would remain permanent unless the ankle joint was fused; that surgery would be required to fuse the bones in her ankle and that this would leave her with an ankle permanently stiff. He testified that this type of surgery is known as an arthrodesis; that at the present time she had arthritis in her ankle which was caused by the unusual angle at which she had to walk since the injury, and that the type of arthritis which she had was not progressive but that it would be progressive if the irritation continued. Dr. Kaiser, on behalf of the defendants, was asked a hypothetical question which embraced the various elements testified to by Dr. Smith, and Dr. Kaiser gave it as his opinion, based upon the hypothetical question put to him, that the injury to her ankle was stationary, and, therefore, not progressive. He stated that one of the reasons for his

crossing before the other vehicle will reach the intersection.
This court held that this instruction should not have been given
because it emphasized the importance of the right of way and
overlooked the duty of the driver of the car entering the through
street not only to look before entering the intersection, but
having looked, not to proceed until the intersection could be
crossed with safety. In the instant case there was no error in
giving this instruction in view of the evidence found in this
record.

It is finally pointed out that the court erred in
excluding testimony in evidence introduced by Dr. Ketter
concerning the extent of the fracture of the right tibia, medical
witnesses. The court then testified that the injury which the
plaintiff alleged was not received as he was in the restaurant
was a permanent injury accompanied by pain and would result in per-
manent disability. The court said that the injury would be
permanent to the right tibia and that this would leave
him with an entire permanent disability. It testified that this type
of injury is known as an orthopedic; that it is permanent and the
had arthritis in the right tibia which was caused by the unusual angle
at which the leg is bent since the injury. The type of
arthritis which was not a temporary one but is called
progressive is the fracture condition. Dr. Ketter, on behalf
of the defendant, was asked a hypothetical question which required
the witness to assume that the right tibia and the right
leg it is the opinion, based upon the hypothetical question put
to him, that the injury to the right tibia was temporary, and, there-
fore, not progressive. He answered that one of the reasons for his

conclusion that the condition present in her ankle was stationary was that there was no evidence present in her ankle of progressive disability. Other reasons that he had for his opinion that the disability was not progressive were, upon objection, stricken. Counsel for appellants insist that Dr. Kaiser's testimony that in his opinion the condition of plaintiff's ankle was stationary was also stricken, but we have read the abstract and record carefully on this point, and we are unable to agree with the construction which the defendants seek to have us place upon the court's ruling. Dr. Kaiser's opinion that the condition in plaintiff's ankle was stationary was not stricken. The jury had before it Dr. Smith's testimony that the injury to plaintiff's ankle was permanent, painful, and probably progressive if not remedied by surgery, and, also, Dr. Kaiser's testimony that the injury to her ankle was stationary and not progressive. Dr. Kaiser was then asked whether or not he had an opinion based upon reasonable medical certainty as to whether or not the conditions and circumstances which had been described to him with regard to the hypothetical person would indicate any further treatment of any nature. The court sustained an objection to this question on the ground that Dr. Kaiser had not had an opportunity to examine the patient and that there was no evidence in the record that plaintiff contemplated further treatment and, especially, surgery. Counsel insist that this ruling is so prejudicial to their rights as to require a reversal of ^{this} judgment. We do not think so. In the first place, we do not believe that the offer of proof made by the defendants with reference to Dr. Kaiser's opinion as to further treatment of plaintiff's ankle was in rebuttal of any

issue which plaintiff had injected into her case in chief. The record does not show that plaintiff contemplated further treatment to her ankle or contemplated surgery to it or that surgery had been recommended by her surgeon, Dr. Eichler, who treated her for the disability in question. As we read Dr. Smith's testimony, he simply indicated that he was of the opinion that surgery was recommended. Secondly, although Dr. Kaiser was not permitted to say in so many words that it was his opinion that surgery was unnecessary, one cannot escape the conclusion, after reading his testimony, that this was his opinion, and the jury undoubtedly so understood it. Any possible error that might have been committed in the ruling of the trial court in refusing to permit Dr. Kaiser to state that in his opinion surgery was unnecessary to relieve the condition present in plaintiff's ankle was not so prejudicial as to require a reversal of this cause.

We find no reversible error in this record, and the judgments rendered by the trial court are, therefore, affirmed.

Judgments affirmed.

Abstract

Gen. No. 10509

Agenda No. 17

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT 345 I.A. 3¹

May Term, A. D. 1951.

IMOGENE E. WHETSTONE,

Plaintiff-Appellant,

VS.

KANE COUNTY TITLE COMPANY,
a Corporation,

Defendant-Appellee.

Appeal from the
Circuit Court of
Kane County.

Dove, J.

Imogene E. Whetstone appeals to this court seeking the reversal of a final order entered by the Circuit Court of Kane County dismissing her complaint against Kane County Title Company.

The complaint alleged that the plaintiff is a third party beneficiary under the terms of a simple contract by which the defendant, for a consideration, agreed to perform certain undertakings; that she brings this action (1) to compel fulfillment of said undertakings, and (2) to obtain reimbursement for losses sustained from prejudicial acts of defendant which delayed and prevented the fulfillment of said undertakings; that the contract referred to is in the possession of the defendant and not

SECRET

CONFIDENTIAL

TOP SECRET

CONFIDENTIAL

SECRET

CONFIDENTIAL

SECRET

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

accessible to her; that the defendant is a corporation, doing business as a guarantor of property titles; that on August 1, 1950, she became a party to a purchase contract and escrow agreement in which the seller, Mrs. Josephine Reitmayer, agreed to sell and she (the plaintiff) agreed to buy a certain tract of land in St. Charles Township, Kane County, Illinois, and that in the same instrument the City National Bank and Trust Company of Chicago agreed to act as escrow agent.

The complaint further alleged that pursuant to the terms of said purchase contract and escrow agreement, the seller conveyed to her by warranty deed the property in question and that said deed had been duly recorded in the Recorder's Office of Kane County, Illinois; that pursuant to the purchase contract and escrow agreement, the seller signed and forwarded to the escrow agent an application made by her upon the defendant for a Guarantee Policy in the amount of \$5500.00 to sustain title in plaintiff to the property as described in the deed of conveyance, said description accompanying the said title application. The complaint then alleges that it is the said title guarantee application filed by the seller of this property through the escrow agent that the plaintiff, as a third party beneficiary, seeks to enforce by this suit. The complaint then alleges that on September 7, 1950, defendant accepted said application for title policy, assigning to said application its number 28474, and that in said application so accepted by defendant, the seller of the property named the buyer (plaintiff) as beneficiary and called upon defendant to issue a title policy to sustain title in plaintiff to the property described in the application.

...to be; that the defendant is a corporation, doing
business as a corporation of property title; that on August 1,
1950, the defendant is a corporation of property and mortgage
agreement in which the seller, Mrs. Lawrence Williams, agreed
to sell and she (the plaintiff) agreed to buy a certain tract
of land in St. Charles Township, Cook County, Illinois, and that
in the same instrument the City of Chicago was named as the
of Chicago agreed to act as escrow agent.

The complaint further alleged that pursuant to the
terms of said purchase contract and various amendments, the seller
conveyed to her of recordly deed the property in question and
that said deed had been duly recorded in the Recorder's Office
of Cook County, Illinois; that pursuant to the purchase contract
and various amendments, the seller agreed and intended to the
buyer to execute an affidavit made by her upon the defendant for a
certain policy in the amount of \$5000.00 to certain title in
plaintiff as the property as described in the deed of conveyance,
said affidavit and recording the said title policy. The
complaint further alleged that as to the said title policy
application filed by the seller of this property through the
seller, namely that the plaintiff, as a third party beneficiary,
was to receive the said title. The complaint then alleged that
on December 7, 1950, the record showed said application for
title policy, according to said application for number 6647, and
that in said application as certified by defendant, the policy of
the property named the name (plaintiff) as beneficiary and
seller upon defendant to issue a title policy to certain title
to plaintiff in the property described in the application.

It is then alleged that after a lapse of several weeks following receipt of said title guarantee application the defendant proceeded to act upon it and, in accordance with its regular custom, it issued an opinion based upon its findings, a copy of which opinion plaintiff attached to her complaint, as Exhibits 6 and 6-a; that defendant did not fulfill its undertakings in compliance with the application; that it did not direct its opinion to said property as it is described in the various deeds of conveyance down through the chain of title, or to the property as it is described in the title application; that the defendant rendered its opinion worthless by directing the opinion to property described in terms insufficient to indicate the property conveyed; that the description of the property, as improvised and adopted by defendant, to which its opinion is directed, and for which its letter of opinion indicated it would issue a title guarantee policy, limits the shape and acreage of the property by dimensions for which there is no supporting authority of record or with the actual fenced in physical property; that defendant's improvised description to which it directed its opinion and which it refuses to revise to comply with the application for a title guarantee policy limits the property in question by a boundary line referred to as the southerly line of Novak's Re-Subdivision of Novak's Subdivision to the Town of St. Charles, irrespective of the fact that such boundary line is no where mentioned in any of the deeds of conveyance of record and irrespective of the fact that Novak's Re-Subdivision may not be accepted as part of a metes and bounds description, since it erroneously extends its boundaries (upon paper) beyond the subdivision which it re-subdivides.

It is then alleged that after a lapse of several years

following receipt of said title Alexander applied to
the relevant authorities to get upon it and, in accordance with the
relevant custom, it found an opinion based upon the finding,
a copy of which opinion plaintiff wished to use in connection with
the application for a title; that defendant did not fulfill its under-
standing in connection with the application; that it did not
direct the opinion to said property as it is described in the
various deeds of conveyance from Thomas the owner of title, or
as the property as it is described in the title application; that
the defendant intended its opinion to be directed to plaintiff, the
opinion to properly describe in terms intelligible to indicate
the property conveyed; that the description of the property, as
intended and adopted by defendant, to which the opinion is
directed, and for which the title of opinion indicated it was
issued a title for the purpose, failed to show and describe
of the property by reference to which there is no supporting
evidence of record as to the actual land in question.
Property; that defendant's intended description to which it
directed its opinion and which it refused to revise to comply
after the application for a title for the purpose failed to
property in relation to a boundary line referred to in the
deed of title of the plaintiff's father's land as being
to the line of St. Charles, irrespective of the fact that such
boundary line is no longer shown in any of the deeds of con-
veyance of record and irrespective of the fact that the line
indicated by the defendant as part of a water and house
division, since it is not shown in the boundary line
(part) beyond the subdivision which is re-subdivided.

The plaintiff further alleged in her complaint that defendant did not point out in its opinion or indicate that there are any irregularities in the transactions of record which made it necessary to change or alter the description of the property; that defendant indicated its willingness to issue a title guarantee policy and then it insinuated the changed description into its opinion without calling it to plaintiff's attention; that defendant intended by this subterfuge to avoid the issuance of a title guarantee policy or the fulfillment of its undertakings; that defendant arbitrarily and without explanation refused to consider plaintiff's suggestion that the original Novak Subdivision plat be made the basis of defendant's description of the property in question; that defendant advised plaintiff that it would issue a title guarantee policy only on the property which it described in its letter of title opinion; that defendant will issue a guarantee policy only on property limited by its improvised, unwarranted, incorrect and indefinite dimensions and erroneous survey plat; that the escrow agent requested defendant to render a notice of its refusal to comply with the terms of the application for a title guarantee policy, but that pursuant to said request, defendant has failed to provide a written statement of any kind indicating the position that it has taken; that defendant has offered no explanation or justification, either orally or in writing, for its refusal to render an opinion of its findings directed to the property as described in the title guarantee policy application; that the unexplained and unjustified refusal of the defendant to issue a title guarantee policy directed to the property as described in the deeds of conveyance in the chain of title or to render an opinion indicating the reason for such refusal, reflects a cloud

The plaintiff further alleged in her complaint that defendant did not point out in its opinion or indicate that there are any irregularities in the transactions of record which made it necessary to change or alter the description of the property; that defendant indicated its willingness to issue a title guarantee policy and then it introduced the changed description into its opinion without calling it to plaintiff's attention; that defendant intended by this course to avoid the issuance of a title guarantee policy on the fulfillment of its undertakings; that defendant arbitrarily and without explanation refused to consider plaintiff's suggestion that the original survey subdivision list be made the basis of defendant's description of the property in question; that defendant advised plaintiff that it would issue a title guarantee policy only on the property which is described in the list of title original; that defendant will issue a title guarantee policy only on property limited by its recorded, unrecorded, incorrect and indefinite dimensions and erroneous survey plat; that the entire grant requested defendant to render a notice of its refusal to comply with the terms of the application for a title guarantee policy, but that defendant to said request, defendant has failed to provide a written statement of any kind indicating the position that it now takes; that defendant has offered no explanation or justification, either orally or in writing, for its refusal to render an opinion of its findings directed to the property as described in the title guarantee policy application; that the unexplained and unjustified refusal of the defendant to issue a title guarantee policy directed to the property as described in the facts of conveyance in the chain of title as to render an opinion indicating the reason for such refusal, reflects a clear

upon the title to the property; that said acts of the defendant are not the legitimate prerogative of the defendant but are wilfully directed acts in violation of its contractual obligation and intended to prevent the free and normal use and transfer of the property in question; that defendant's arbitrary refusal to fulfill its undertakings as established by its acceptance of the said application for title policy, prevents the parties to the escrow agreement from carrying out the same; that as a result of said prejudicial acts of the defendant, and other damaging acts incidental thereto, she has suffered costly delays and has been put to considerable expense which will represent a total loss to her if she is forced to withdraw from the transaction because of defendant's refusal to issue the title guarantee policy.

The prayer of the complaint is that the court issue an order requiring the defendant to fulfill its undertakings as established by its acceptance of the said application for title policy and requiring the defendant to render an unbiased opinion of its findings directed to the property which the title application describes, and if its opinion discloses no major discrepancies in the record title of said property, to require defendant to issue a guarantee policy to cover the property described in the conveyance and in the application. She further prayed for judgment against the defendant in the sum of \$2000.00 and costs to reimburse her for the delays and losses suffered as a result of defendant's damaging and prejudicial acts as recited in the complaint.

Attached to the complaint as Exhibit 1 was the affidavit of plaintiff, which recited: "That she is the third party beneficiary of a simple contract entered into by Josephine Reitmayer

upon the title to the property; that said title of the defendant
and the defendant's representative in the reference and are
initially directed to the defendant in violation of its contractual obligation
and intended to transfer the title and interest in the property to
the property in question; that defendant's representative refused to
fulfill its obligation as established by its conduct and the
said application for title policy, however, the parties to the
contract agreement have carried out the same; that as a result of
said judicial acts of the defendant, and of its carrying out
incidental thereto, she has suffered costly delays and has been
put to considerable expense which will represent a total loss to
her if she is forced to withdraw from the transaction because of
defendant's refusal to issue the title insurance policy.
The prayer of the complaint is that the court issue an
order requiring the defendant to fulfill its undertaking as
established by its acceptance of the said application for title
policy and requiring the defendant to render an adequate opinion
of the findings directed to the property which the title applica-
tion described, and if the opinion discloses no major discrepancies
in the record title of said property, to require defendant to
issue a guarantee policy to cover the property described in the
complaint and in the application. The further prayed for judi-
cial acts against the defendant in the sum of \$200,000 and costs to
reimburse her for the delays and losses suffered as a result of
defendant's delaying and judicial acts as recited in the
complaint.
Attached to the complaint as Exhibit 1 was the affidavit
of plaintiff, which recited: "That she is the third party
beneficiary of a title contract entered into by Josephine Bellmeyer

and defendant in which Josephine Reitmayer having undertaken and agreed in an escrow agreement to furnish a title policy guaranteeing title in plaintiff to a certain definitely described parcel of land situated in St. Charles Township, Kane County, Illinois, applied to defendant for a guarantee policy describing the property and naming plaintiff as beneficiary; that the said application was made out upon one of the regular forms of defendant which plaintiff procured from it and furnished to the said Josephine Reitmayer; that she saw said application just before it was tendered to defendant by the escrow agent; that at that time it had attached thereto and made a part thereof a description of said parcel of land set forth in the same terms as the description of the land provided by the deed of conveyance and by the abstract which accompanied the application for title policy when it was forwarded to defendant; that defendant accepted said application and assigned to it its number 28474 and proceeded to act upon it, thus acknowledging its part in the undertakings which the said application set forth; that said application for guarantee policy is to the best of her knowledge in the possession of the defendant and is not accessible to her."

A photostatic copy of the application for the title guarantee policy made to the defendant by Josephine Reitmayer appears in the record. Its language, so far as pertinent here, is as follows:

The undersigned hereby applies to the Kane County Title Company for a Guarantee Policy, in its usual form, in the sum of \$5500.00 upon the title to the lands hereinafter described. * * * * It is understood by the applicant that the Company will not by its policy guarantee against rights or claims of parties in possession not shown of record and questions of survey. If the company, after the examination of the title to said premises, shall decline to issue

and defendant in which Josephine Heitzmayer having undertaken and agreed in an escrow agreement to furnish a title policy guaranteeing title in plaintiff to a certain definitely described parcel of land situated in St. Charles Township, Kane County, Illinois, applied to defendant for a guarantee policy describing the property and naming plaintiff as beneficiary; that the said application was made out upon one of the regular forms of defendant which plaintiff procured from it and furnished to the said Josephine Heitzmayer; that she was said application just before it was tendered to defendant by the escrow agent; that at that time it had attached thereto and made a part thereof a description of said parcel of land set forth in the same terms as the description of the land provided by the deed of conveyance and by the abstract which accompanied the application for title policy when it was forwarded to defendant; that defendant received said application and assigned to it the number 58474 and proceeded to set upon it, thus acknowledging its part in the underwriting which the said application set forth; that said application for guarantee policy is to the best of her knowledge in the possession of the defendant and is not accessible to her."

A photostatic copy of the application for the title guarantee policy made to the defendant by Josephine Heitzmayer appears in the record. Its language, so far as pertinent here, is as follows:

The undersigned hereby applies to the Kane County Title Company for a Guarantee Policy, in the usual form, in the sum of \$500.00 upon the title to the land hereinafter described. It is understood by the applicant that the Company will not by its policy protect against title or claims of parties in possession not shown of record and questions of priority. If the company, after the examination of the title to said premises, shall decline to issue

the policy on account of defects in the title, the applicant hereby agrees to pay said Company a reasonable charge for the services rendered. * * * *

CITY NATIONAL BANK AND TRUST COMPANY
308 South LaSalle St., Chicago 90, Ill.

/Signed/	<u>Josephine Reitmayer</u>	applicant
Address	<u>4334 N. Richwood Ave.</u>	
City	<u>El Monte, Calif.</u>	"

Attached to the title application on a separate sheet of paper was a description of the property for which a guarantee policy was sought, and near the top of the application was the number assigned by the defendant to the application, "28474," and the date thereof, "9-8-50."

The substance of the grounds contained in defendant's motion to strike was (a) that the complaint did not show any contractual relationship between plaintiff and defendant, (b) that it did not show the issuance of or any obligation to issue any guarantee policy or undertaking by the defendant which could be made the basis of any cause of action, (c) that said complaint consists largely of the conclusions of the plaintiff, and (d) that it did not state a cause of action.

Plaintiff appeared in the trial court and in this court pro se. The trial court was of the opinion that plaintiff's complaint did not state a cause of action because it did not contain an allegation that the defendant, in accepting the application for a title guarantee policy, promised or agreed to furnish such a policy upon the property described in the application, that her complaint did not contain any allegation which established any obligation on the part of the defendant to issue a guarantee

the policy or absence of defects in the title, the
applicant hereby agrees to pay said company a reasonable
share charge for the services rendered.

CITY NATIONAL BANK AND TRUST COMPANY
100 SOUTH LAUREL ST., CHICAGO 90, ILL.

JOHN A. HICKMAN, JR.

J. Edgar Hoover

Address

City

A finding to the title applicant is on a separate sheet of paper
and a description of the property for which a guarantee policy
was sought, and near the top of the application was the number
assigned by the defendant to the application, 100-100, and the
date thereof, 10-1-30.

The subject of the finding contained in defendant's
action to strike was (a) that the complaint did not show any
contractual relationship between plaintiff and defendant, (b)
that it did not show the issuance of or any obligation to issue
any guarantee policy or undertaking by the defendant, and (c)
that the basis of any cause of action, (a) that said complaint
contained largely of the conclusions of the plaintiff, and (b) that
it did not state a cause of action.

Plaintiff appeared in the trial court in this case
and the trial court was of the opinion that plaintiff's com-
plaint did not state a cause of action because it did not contain
an allegation that the defendant, in accepting the application
for a title guarantee policy, promised or agreed to furnish such
a policy, and the property described in the application, that her
complaint did not contain any allegations which established any
obligation on the part of the defendant to issue a guarantee

policy upon the property described in the application, and, that so far as it appeared from the complaint, the defendant never undertook to issue a policy upon the property described in the application, but, on the contrary, refused to issue a policy on that property but offered to issue a policy on the property described in its title opinion.

A contract has been defined as a promise from one to another, either made in fact or created by the law, to do or to refrain from doing some lawful thing. (12 Am. Jur., Contract, Sec. 2, p. 496, and cases there cited.) A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. (Am. Law Inst. Restatement, Contracts, Vol. 1, Sec. 1.) After a careful study of the allegations of plaintiff's complaint, we are impelled to the conclusion that the interpretation placed thereon by the trial court is the only one justified. Reading and construing the complaint, together with the affidavit attached thereto and in support thereof, the conclusion is inescapable that Josephine Reitmayer tendered to the defendant an application for a title guarantee policy upon certain property described and set forth in said application; that the defendant was unwilling to issue a title guarantee policy using the description set forth in the application but was willing to issue its title guarantee policy using a different description from that set forth in the application. It is conceded that the two different descriptions do not describe the same identical property. The refusal of the defendant to issue its title policy on the property described in the application and its proposal to issue its policy on the property which it described in its title opinion was a rejection of plaintiff's application and a counteroffer ~~to plaintiff~~ to

policy upon the property described in the application, and, that
as to it is requested that the defendant be
understood to issue a policy upon the property described in the
application, but, in the event, refused to issue a policy
on that property but offered to issue a policy on the property
described in the title application.
A contract was made between the parties and one to
another, which was in fact or treated by the law, as to it to
remain from doing some legal thing. (12 Cal. 2d, 1943, 1944)
See, E. R. 1943, and cases there cited. A contract is a contract
or a set of promises for the benefit of which the law gives a
remedy, or the performance of which the law in some way recognizes
as a duty. (1st. Law Inst. Restatement, Contracts, Vol. 1, Sec. 1.)
After a careful study of the allegations of plaintiff's complaint,
we are inclined to the conclusion that the interpretation placed
thereon by the trial court is the only one justified. Reading
and construing the complaint, together with the affidavits attached
thereto and in support thereof, the conclusion is inescapable that
Josephine Polynoy, referred to in the complaint as applicant for
a title guarantee policy upon certain property described and set
forth in said application; that the defendant was unwilling to
issue a title guarantee policy upon the description set forth
in the application but was willing to issue a title guarantee
policy upon a different description from that set forth in the
application. It is conceded that the two different descriptions
do not describe the same identical property. The refusal of the
defendant to issue the title policy on the property described
in the application and the refusal to issue the policy on the
property which is described in the title policy was a rejection
of plaintiff's application and a counteroffer to the plaintiff to

plaintiff to issue a policy in accordance with its title opinion. (Worley v. Holding Corporation, 348 Ill. 420; Snow v. Schulman, 352 Ill. 63.) Plaintiff was at liberty to accept or reject this counteroffer. Defendant could not force its proposal upon her any more than the proposal contained in the original title application could be forced upon the defendant. As we view this complaint, giving to it the most liberal construction which its language will admit, there is no allegation in it that the defendant in accepting the application promised or agreed to do anything, nor are there alleged in the complaint sufficient facts from which the law would raise a duty on the part of the defendant to issue the title guarantee policy applied for. The essence of the complaint filed is that a title application was made to the defendant, that as a result of said application defendant made an investigation of the title to the property described in the application and declined to issue a policy on the property described in the application, but did offer to issue a title policy on other property.

While the defendant's conduct in refusing to issue a guarantee policy upon the property described in the application without giving its reasons for such refusal leaves much to be desired, such cannot be made the basis for an action against it in the absence of an agreement or a duty on its part to so do. A necessary allegation in plaintiff's complaint was an averment that the defendant in accepting the policy application agreed to do or not to do something. There is no such allegation. Plaintiff has attempted to state a cause of action against the defendant for its refusal to issue a title guarantee policy upon property of a certain description without alleging any promise or agreement by the defendant so to do, or without alleging any facts from

which the law would create a duty on the part of the defendant to issue the policy for which application was made.

The judgment of the trial court is correct and it is affirmed.

Judgment affirmed.

which the law would create a duty on the part of the defendant

to issue the policy for which application was made.

The judgment of the trial court is correct and is

in affirm.

Defendant affirmed.

2013 A

Abstract

Gen. No. 10515

Agenda No. 21

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1951.

345 I.A. 33²

CARL FRANKS,)	
Plaintiff-Appellant,)	
vs.	)	APPEAL FROM
)	
ADELAIDE CHILDS,	)	CIRCUIT COURT,
Defendant-Appellee.)	)	WINNEBAGO COUNTY.

ANDERSON -- J.

Carl Franks brought this suit against Adelaide Childs, administrator of the estate of Theron B. Childs, deceased, for damages arising out of an automobile collision in which he was injured on January 7, 1949.

Theron B. Childs, defendant's testate and the driver of defendant's testate's car, died on the day of the accident, and Adelaide Childs was appointed administrator of his estate with will annexed and was made party defendant to this suit.

The complaint charges negligence on the part of the defendant's testate. The answer of the defendant denied all acts of negligence and charged the plaintiff with contributory negligence. The reply filed to the answer denied the contributory negligence as alleged in the answer.

The case was heard before a jury who returned a verdict in favor of the plaintiff and against the defendant's testate, and assessed his damages at \$10,000.00. A special interrogatory was submitted to the jury at the request of the defendant, wherein they were asked if the plaintiff was



guilty of negligence in connection with the operation of his automobile just before and at the time of the accident in question, which directly contributed or proximately contributed to bring about or cause the damages and injuries in question. The jury answered this interrogatory in the negative.

Subsequently the trial court granted defendant's motion for judgment notwithstanding the verdict, and granted in the alternative defendant's motion for a new trial.

Carl Franks, the plaintiff, brings this appeal, urging as error that the court erred in granting both of these motions. No other questions are presented on this appeal.

The record discloses that about two o'clock in the afternoon of January 7, 1949, the plaintiff, Carl Franks, who was a farmer and merchant residing at Marengo, Illinois, was driving his Nash automobile in an easterly direction on U. S., Illinois State Highway 20, about five or six miles east of the city of Rockford, Illinois. U. S. Highway 20 is a concrete state road about twenty feet in width running east and west with the usual two traffic lanes marked. The plaintiff, driving his car, was approaching an intersecting highway known as Mulford Road. Mulford Road is a blacktop road about eighteen feet in width running at right angles to U. S. 20 and extending in a north and south direction. On each side of Mulford Road are stop signs erected by the State Highway Department warning traffic on Mulford Road to stop for the State highway, U. S. Highway 20, which is commonly called a preferential highway. There were no signs on either side of U. S. Highway 20 indicating the presence of a crossroad, and there is no evidence in the record that the plaintiff knew of the existence of the crossroad at said point. The day was bright and

clear and the pavement was dry. Visibility was good and there were no obstructions limiting the vision of the driver of either car as they approached the intersection for more than one-half mile. The evidence discloses that prior to the time of the collision the plaintiff was operating his car at about forty or forty-five miles an hour, and the defendant's testate was operating his car at about the same rate of speed. The two cars collided at the intersection, the defendant's testate was killed, and the plaintiff received serious injuries for which he brings this suit.

Don Bobert testified on behalf of the plaintiff that just prior to the collision in question he was driving his truck in a westerly direction on Highway 20. As he approached Mulford Road he saw a Buick car driven by Dr. Childs, defendant's testate, travelling south on Mulford Road at a speed of about forty to forty-five miles per hour. Coming from the west he saw the Franks car travelling at about the same speed. Bobert had stopped his truck off the highway and the collision occurred just in front of him. Both cars were approximately the same distance from the intersection when he first saw them. The Buick car driven by Dr. Childs failed to stop at the State highway, and was struck in the right rear wheel by the Franks car. Gerald Windsor testified that he was operating his truck behind Bobert, and he likewise saw both cars approaching the intersection. Defendant's car was travelling between forty-five and fifty miles per hour, and failed to stop or to slacken speed. Windsor saw plaintiff's car but could not estimate its speed as there was another car between the defendant's car and him.

Hillis Pence testified that Franks told him that he did not see the defendant's car coming, but when he had seen it he had tried to turn to the left to avoid hitting it.

The coroner, David Klontz, testified on behalf of the defendant that plaintiff Franks testified at the coroner's inquest that he had not seen the Childs car from the side road, and that he, Franks, was driving on the right side of the road, that the highway was clear, and he had not looked to his left.

Carl Franks, who was called as a witness on his own behalf, testified according to the abstract of the record: "On January 7, 1949, I had a conversation with Hillis Pence at the scene of the accident. I told him I was driving east on Route 20, and I noticed the car when I was right on it. I told him I didn't see the car until it was just in front of me, and that I swerved to the left to try to avoid hitting the car." Carl Franks was recalled as an adverse witness under Section 60 of the Practice Act. (Ill. Rev. Stat. 1949 ch. 110, par. 184.) The ~~defendant~~ ^{plaintiff} was asked whether or not he testified at the coroner's inquest, and he stated he had, and further testified: Q. "Mr. Franks, did you see the Childs car coming toward U. S. Highway 20 before it got onto that highway?" A. "No." Q. "Do you know whether he was on the highway or not?" A. "No." Q. "Did you look to the left before you entered the intersection of Mulford Road and U. S. 20?" A. "Would you repeat that?" Q. "Did you look to the left, to your left before you entered the intersection of U. S. 20 and Mulford Road on this day?" A. "I don't recall." Q. "At the inquest in question to which I referred, was this question asked you and did you make this answer? 'You don't know whether he stopped before he came on the highway then or not?'" A. "No, I didn't see it. I know this much that I was on my right, I was on the highway and it was clear. I didn't take any precaution to look on the left side." A. "If I said that I don't recall it." Q. "Did you say it

or not?" A. "I don't recall saying it."

The questions presented on this appeal are whether the trial court under the evidence and under the law was justified in entering a judgment notwithstanding the verdict in favor of the defendant, and whether he was justified in the alternative in granting defendant's motion for a new trial. Sec. 68 of the Practice Act permits either party to move for a judgment notwithstanding the verdict. (Ill. Rev. Stat. 1949, chap. 110, par. 192.) The Supreme Court, Rule 22, (Ill. Rev. Stat. 1949, chap. 110, par. 259.22) states that the power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence, it would have been the duty of the court to direct a verdict without submitting the cause to a jury. The rule also provides that the court may at the same time decide in the same order any motion for a new trial made by the party asking for a judgment notwithstanding the verdict. In this case the trial court followed this practice. The power of the court, whether the motion is for a directed verdict or for a judgment notwithstanding the verdict, is essentially the same. (Hughes vs. Bandy, 404 Ill. 74; Hunt vs. Vermilion Co. Child. Home, 381 Ill. 29.) In passing on this motion neither the trial court nor the reviewing court has a right to weigh the evidence. The question is not whether the verdict is against the manifest weight of the evidence, but the question is whether, assuming all the evidence in favor of the plaintiff to be true and the inferences that may be legitimately drawn therefrom, does such evidence establish the plaintiff's case? (Hunt vs. Vermilion Co. Child. Home, supra.) If there is contradictory evidence introduced, then the court has no power to grant the motion. If the plaintiff's evidence makes a prima facie case, it is sufficient for the jury to consider, and then the motion should be denied. (Hughes vs. Bandy, 404 Ill. 74; Moran vs. Gatz 390 Ill. 473.) The court in deciding a motion for a

104.068
✓ 105.22

directed verdict or judgment notwithstanding the verdict, must consider the evidence in its most favorable light, giving the plaintiff the benefit of its most reasonable inferences. (Blumb vs. Getz, 366 Ill. 273; Merlo vs. Public Service Co., 381 Ill. 300; Rees vs. Spillane, 341 Ill. App. 647; Ritter vs. Nieman, 329 Ill. App. 163.)

The rule with reference to motions for a new trial are quite different. In hearing a motion for a new trial the trial court has a right to weigh the evidence and determine whether or not the verdict of the jury preponderates in favor of the party obtaining the same. (Blumb vs. Getz, supra.) The reviewing court has the right to reverse an order of the trial court granting a new trial when it can say that that order is against the manifest weight of the evidence.

It is admitted and no one urges otherwise, that the defendant's testate, Dr. Childs, was guilty of negligence in running the stop sign. He could see the plaintiff's car approaching, and under the law it was his duty to stop and yield the right of way to the plaintiff, who was traveling on the preferential highway. The sole question urged by the appellee here is that the plaintiff was guilty of contributory negligence, which will prevent his recovery. The question of contributory negligence is one which is essentially a question of fact for the consideration of the jury. As stated in Blumb vs. Getz, supra, at page 277: "The question of contributory negligence is one which is pre-eminently a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case. As was stated in Thomas vs. Buchanan, 357 Ill. 270: 'The question of due care on the part of the plaintiff's intestate is always

a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased."

Taking the testimony of the plaintiff in its worst light against himself, he testified that he did not see defendant's ~~testate's~~ car. It must be borne in mind that the plaintiff was riding on the preferential highway at a reasonable rate of speed, and he had a right to assume that the other car, coming from the left with a stop sign in front of it, would stop and obey the law. The testimony is unquestioned that Dr. Childs' car never stopped at all, and came upon the State highway at a speed of about forty to forty-five miles an hour. If the plaintiff had been violating the law, that of itself would not prevent his recovery. *Roberts vs. Cipfl*, 313 Ill. App. 373, is a case involving a wrongful death arising out of an automobile collision at an intersection where one of the cars was travelling on a through street. The court said on page 375 of the opinion: "Must had a right to assume that defendant, approaching a through street, where there was a boulevard 'stop' sign, would stop at that street, before entering the intersection. A person has a right to presume that other parties will obey the statutes and ordinances in force in a given place. (Citing authorities)"

Here in the instant case plaintiff had a right to assume that the approaching car would stop and not violate the law. The fact, if it be a fact, that the plaintiff did not look for or see the car, would not be fatal to the plaintiff's case. It probably would have made no difference if he had seen it, as he had a right to assume that the other car would yield the right of way. Whether the fact that he did not look, under the facts in this case, would not conclusively bar him from recovery. Did he use such care as an ordinarily prudent man would have used under like or similar

circumstances? Whether he used such care was pre-eminently a question of fact for the jury to determine, from all the surrounding circumstances and evidence adduced at the trial.

Appellee cites several cases such as Illinois Central R. R. Co. vs. Oswald, 333 Ill. 270, and Carrell vs. New York Central R. R. Co., 384 Ill. 599, where it has been said that in railroad crossing cases the plaintiff may not recover where he could have looked but claimed he did not see the approaching train. These cases are not applicable to the facts here. They also cite White vs. City of Belleville, 364 Ill. 577. All this case holds is that where there is a question of fact involved in a lawsuit, it should be submitted to the jury, unless the facts raise only a question of law, but that on a hearing on a motion for a new trial, the courts should weigh the evidence, and if manifestly against the weight of the evidence, should reverse the judgment and remand the cause for a new trial. There is no dispute about this rule of law. They also cite Kirchoff vs. Van Scoy, 301 Ill. App. 366. This case involves an intersection case with no stop signs involved, and holds that where two cars are approaching an intersection, regardless of the right of way, especially where it is a busy intersection and the question of who was closest to the intersection at the time is involved, a reasonably prudent person should not rely upon the right of way statute. This case has little application to the facts here.

Appellee cites no cases where a stop sign is involved. The facts in the case of Ritter vs. Nieman, supra, are quite analogous to the facts in the instant case. In this case plaintiff brought a suit against the defendant who failed to observe a stop sign on a side road and collided with an automobile in which the appellant's intestate was riding.

At the close of all the evidence a motion was filed by the defendant for a directed verdict, one count charging ordinary negligence, and the second willful and wanton misconduct, which was allowed after a motion for new

trial was overruled and a judgment was entered on said verdict in favor of the defendant and against the plaintiff. The evidence disclosed in this case that the car was proceeding at a reasonable rate of speed on a through highway, and when it had almost cleared the intersection was struck by the defendant's truck. Defendant admitted that he did not see the car until he struck it. There was evidence in the record that the defendant did not stop before entering the intersection. The court says, on page 171 of the opinion: "Our courts have repeatedly held since the pronouncement in the case of Greenwald vs. Baltimore & Ohio R. Co., 332 Ill. 627, that the law does not tolerate the absurdity of one saying he looked and did not see when there is nothing to prevent it. What is the purpose of a stop sign? Certainly, it does not signify that a motorist should stop, and then blindly proceed through a protected intersection without determining that he can do so with reasonable safety. The operator of a motor vehicle, when he stops at a preferred highway, should ascertain if he can proceed safely across such highway. If he cannot, he should not enter it." The court further says on page 171 of the opinion: "A stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare." The court says on page 173 of the opinion: "We are of the opinion that it was a question of fact for the jury to determine whether Atz and Ritter were in the exercise of due care just before and at the time of the accident." The court reversed the case, and held that it should have been submitted to a jury on both counts.

In Miller vs. Burch, 254 Ill. App. 387, this court considered the question whether or not the plaintiff was guilty of contributory negligence as a matter of law, because he was operating his automobile with his lights on dim, contrary to the statute. The court says on page 391 of the opinion: "Whatever the rule in other states may be, the rule supported

by the weight of authority in Illinois is that the violation of an ordinance or a statute by acts, either of commission or omission, is only prima facie evidence of negligence. (Citing authorities.)" The court held in this case that the fact of whether the plaintiff's conduct in violating the law constituted negligence was one of fact to be considered by the jury; so in the instant case, assuming that the plaintiff had violated some rule of law, this would not conclusively prevent his recovery. The question of whether the plaintiff was in the exercise of ordinary care at the time of the accident in question, was a question of fact to be determined by the jury. The jury in the instant case, having found that the conduct of the plaintiff was not negligent, and that he was in the exercise of ordinary care for his own safety, their findings should not be disturbed unless it is palpably and manifestly against the weight of the evidence. Did he, the plaintiff, act as an ordinary prudent man would have acted under like or similar circumstances? As above mentioned the plaintiff was travelling on his own side of the road at an ordinary rate of speed on a preferential highway, and had a right to assume that the defendant's testate would stop. Whether or not the plaintiff was contributorily negligent was a question for the jury to decide. It was an invasion of the rights of the plaintiff for the court to substitute his judgment for the jury under the facts here. If every time a person driving on a preferential highway, and seeing an approaching car at an intersection, was required to practically come to a stop, no one could proceed with even fair rapidity along a through street. Plaintiff was on a through highway with a right of way over all cars from the approaching intersection. To prevent his recovery you would have to say that he must anticipate that the other car would violate the law by refusing to stop. In *Rife vs. Colestock*, 297 N. W. 238 (Mich.) the court says at page 239: "There may be circumstances where a driver on a through

street may be guilty of contributory negligence if he proceeds after he has seen that the driver from an inferior cross street has failed to stop in accordance with the stop sign. Plaintiff testified that the reason he did not look to the west again was because the intersection was clear 140 feet to the west when he looked, and that no one who came to a stop in accordance with the law could cross the intersection prior to plaintiff. Was this a reasonable surmise or not? Was a person guilty of contributory negligence in exercising such a belief? We hold that these questions are for the determination of a jury. (Citing authorities.)" We believe the facts in the above case are applicable to the facts here.

After careful consideration and analysis of the evidence and the law in this case, it is our opinion that the trial judge had no right to grant the motion of the defendant for judgment notwithstanding the verdict, and likewise he had no right to grant defendant's motion for a new trial.

His granting these motions constituted reversible error. There is evidence in the record which shows that the plaintiff was not guilty of contributory negligence as a matter of law. The jury by their verdict and by the special interrogatory, found that the plaintiff was not guilty of contributory negligence. We cannot say that their findings are so unreasonable, arbitrary, and not based on the evidence, that it would justify the trial court in granting the defendant a new trial. The finding of the jury is binding on this court under the facts and the law as disclosed by this record, and should not be disturbed. The plaintiff is entitled to have the benefit of his verdict. Cause is reversed, and the trial court is directed to enter a judgment on the verdict in favor of the plaintiff-appellant and against the defendant-appellee for the amount of the verdict.

Judgment reversed and remanded with directions.

Abstract

Gen. Nos. 10499 and 10512

Agenda No. 9

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1951.

345 I.A. 84

HELEN L. BUTTON; JAMES EDWARD BUTTON, a minor,
by his father and next friend, EDWARD A.
BUTTON; RICHARD B. BUTTON, a minor, by his
father and next friend, EDWARD A. BUTTON;
and EDWARD A. BUTTON,
Plaintiffs-Appellees,

vs.

JOSEPH MEYER and MAURICE MEYER, individually
and doing business as SHERIDAN WHOLESALE
LIQUORS,
Defendants-Appellants,

AND

DALE THOMAS,
Defendant-Appellee.

DALE THOMAS,
Plaintiff-Appellee,

vs.

JOSEPH MEYER and MAURICE MEYER, doing
business as SHERIDAN WHOLESALE LIQUORS,
and O. L. TATRO,
Defendants-Appellants.

HELEN L. BUTTON; JAMES EDWARD BUTTON, a minor,
by his father and next friend, EDWARD A.
BUTTON; RICHARD B. BUTTON, a minor, by his
father and next friend, EDWARD A. BUTTON;
and EDWARD A. BUTTON,
Plaintiffs-Appellants,

vs.

JOSEPH MEYER and MORRIS MEYER, individually
and doing business as SHERIDAN WHOLESALE
LIQUORS,
Defendants,

AND

DALE THOMAS,
Defendant-Appellee.

CONSOLIDATED CAUSES

Appeal from the Circuit

Court of Lake County.

Appeal from the Circuit

Court of Lake County.

Appeal from the Circuit

Court of the County of Lake
and State of Illinois.

ANDERSON -- J.

This case involves an automobile and truck collision that occurred west of the intersection of Illinois State Highways Nos. 83 and 45 in Lake County, Illinois. The accident occurred about one P. M. on June 24, 1949. For the purposes of this opinion, it will be considered that Route 83 runs east and west and Route 45 runs north and south. At the point where this accident occurred Route 83 was of black-top construction, about twenty-two feet wide with a white centerline. There were automatic stop and go lights at the four corners of the intersection.

Dale Thomas filed suit in case No. 52857, Circuit Court of Lake County, for damage to his truck against Joseph Meyer, Maurice Meyer and O. L. Tatro, the driver of the Meyer truck, alleging the Meyer truck made a wrongful left turn. Defendants' answer denied this. Later Helen L. Button, James Edward Button, Richard B. Button and Edward A. Button filed their suit in the same court, case No. 52819, against Joseph Meyer, Maurice Meyer and Dale Thomas, alleging that the Meyers and Thomas negligently injured them by reason of the negligent operation of the two trucks. Answers were filed to this complaint denying all liability. The two cases were consolidated for trial in the Circuit Court. The jury rendered separate verdicts in the two cases, viz.:

"Helen Button \$5000.00, James Edward Button \$1000.00, Richard B. Button \$10,000.00, and Edward A. Button \$1250.00." The jury found the defendant, Dale W. Thomas, not guilty as to the Buttons. The jury returned a verdict against defendants Meyer and Tatro in favor of Dale W. Thomas. Motions for judgments notwithstanding the verdict and for new trial were denied, and judgments were entered on the verdicts. The defendants-appellants, Meyer and Tatro, appealed from the judgments awarded against them.

For the purpose of clarity Dale W. Thomas will be referred to as defendant Thomas, and Joseph Meyer, Maurice Meyer and O. L. Tatro will be referred to as defendants Meyer. Helen L. Button, James Edward Button, Richard B. Button and Edward A. Button will be referred to as plaintiffs Button. The following facts appear to be undisputed: it was a clear summer day and the road was dry. Defendant Thomas was approaching the intersection on Route 45 and entering Route 83. These routes join each other and would seem to be one roadway. There was a stop light located at the northeast corner of the intersection. A filling station was located at the northwest corner of the intersection, and west of it there was a tavern-restaurant on the north side of Route 83. Defendant Thomas was driving a three-thousand pound Chevrolet truck. Its cargo consisted of crates of coca-cola and other soft drinks, weighing six thousand pounds. Defendants Meyer's International truck, operated by O. L. Tatro, was approaching the intersection from the west on Route 83. Tatro intended to turn into and to stop at the tavern-restaurant. The Button car was also approaching the intersection from the west, and for some distance prior to the time of the accident had been following the Meyer truck at a speed of about thirty-five miles an hour. The area of the intersection was rural and there was very little traffic on the highway. Helen Button realized that the Meyer truck was going to make a left turn. She reduced the speed of her car. The Meyer truck made its left turn into the driveway of the tavern-restaurant. Meyer's truck made no contact with the Thomas truck. The Thomas truck turned out of its lane of traffic toward the center of the highway into the eastbound lane of the highway. At about that time Thomas first observed the Button car. The Button car drove off the highway to the right. The Thomas truck, attempting to avoid a collision with the Button car, swerved to the right. The cargo of the Thomas truck fell upon

the Button car, totally demolishing it and causing injuries to the plaintiffs Button. The Thomas truck then travelled down the highway westerly back into its own traffic lane, and came to rest on its side off the north edge of the highway.

Richard L. Thacker, a civil engineer, testified that the east edge of the driveway leading into the tavern-restaurant was 110 feet from the stop light located at the northwest corner of the intersection.

George Bock, Jr., Deputy Sheriff of Lake County, Illinois, testified that he arrived at the scene of the accident within ten or twelve minutes after it happened; that he saw the vehicles which were involved in the accident. He testified that the Button car was on the south side of the road about two hundred and ten feet west of the stop sign located at the north side of the road. The Button car was off the highway except the left rear wheel which was on the pavement about six or seven inches. The Thomas truck was off the north shoulder of the highway about ninety feet west of the Button car. Bock further stated: "The skid marks I saw on the highway started in the westbound traffic lane, seventy-five feet west of the stop and go light, the north stop and go light, and they continued sixty feet in the westbound lane. They then crossed the center line of the road, continued eighty or eighty-one feet in the eastbound lane. The west end of these skid marks lined up to a point to the west side of the Button automobile."

Floyd Hutchins, who owns the land adjoining the four corners of the intersection, testified that his field is north of the right of way adjacent to where the accident happened, and it is about twenty feet between the edge of the pavement and his fence line. He picked up several empty cases in the field after the accident.

Helen L. Button, plaintiff, testified that she was following the Meyer truck driving east on Route 83, and that she judged that she and the truck were going about thirty-five miles an hour. She thought the Meyer truck was going to make a left turn, and was seventy-five to a hundred feet

behind him when he started to turn. As the Meyer truck turned into the westbound traffic lane, she saw the Thomas truck swerve into her traffic lane, coming from the east, and it was about one hundred twenty-five feet ahead of her when it started to swerve. When she saw it swerve she tried to get out of the way and averted to her right off the highway. She was bruised and black and blue and was given emergency treatment at the Condell Hospital. She was later taken to the Hinsdale Sanitarium where she remained for eight days. She further testified on cross examination that at a pre-trial deposition she was asked: "Q. 'He slowed from the speed of twenty-five miles an hour within the last two hundred to two hundred fifty feet prior to the turn, and you slowed with him?' A. 'Yes.' Q. 'And isn't that a correct version of the matter?' A. 'Yes.'" She testified that she thought the Meyer truck was going about twenty miles an hour when he made the turn. Also she said: "I don't think the Meyer truck was off the pavement when I saw the truck in my lane of traffic. I don't know whether the front of the Meyer truck was off the pavement. I would say it was in the other lane of traffic, how far off I don't know. I believe the Meyer Brothers truck was still on the other lane of traffic when I first saw the other truck. I don't know how much of it."

Dale Thomas was called by the plaintiffs Button as an adverse witness under Section 60 of the Practice Act (Ill. Rev. Stat., 1949, chap. 110, par. 184). He testified that he approached the intersection from the southeast on Route 45. When he came to within two hundred or two hundred twenty-five feet of the stop light, the light was red, and as the light changed to green he increased his speed, and when he got to the east edge of the intersection he was going about twenty-six miles an hour. He saw an eastbound truck as he crossed the intersection. He didn't notice it except that it was in its own lane of traffic.

He did not see a car behind the Meyer truck. When Thomas was within about fifty feet of the Meyer truck, it turned from the south half of Route 83 to the north half. Thomas made a sharp turn, put on his brakes, and began to slow up. When he thought he was going to hit the Meyer truck, he pulled into the center of the highway. He cleared the Meyer truck by three or four feet. When the rear end of the Meyer truck was making the left turn across the center line of Route 83, he was east and south of it, and he was in the center of the highway, and he began to turn left. Also he testified, "Just as I seen him begin to nose out I seen his hand come out, too, for a left turn. The eastbound truck was travelling, I judge, around twenty-eight miles an hour when it made the left turn. While making the turn it seemed like he increased his speed, to what speed I couldn't say." He further testified: "When I first saw the eastbound auto it was rather close. I thought it was on the pavement. I couldn't say whether it was pulling onto the shoulder or cutting to the right." Thomas came to a stop on the north side of the road on the north edge of the pavement. When his truck came to a stop it was empty. He testified that he was closer than fifty feet to the Meyer truck when its front end crossed the center line. He stated: "When it was fifty feet away from me was the time when I first applied my brakes and started to swerve when I had first seen it turning in my lane of traffic." He did not see the Meyer truck driver signal with his hand until the left side of the Meyer truck was over the center line. He did not apply his brakes until he saw the Meyer truck start to turn. His brakes were in good condition.

There is no dispute that the damages to the Button car amounted to \$1250.00. Several doctors testified as to the personal injuries sustained by the plaintiffs Button. It is undisputed that Helen Button suffered a concussion, that she had lacerations and bruises over most of her body, and that the lobe of her left ear was torn, requiring stitches. Her left

breast was swollen and black and blue, and she was injured over the sacroiliac joint. She was still under a doctor's care. She will have some scarring on the lacerations around the eye and a bad scar on the left knee. She now has pain in her sacroiliac region and in her shoulder, which could last for years.

James Button, aged nine, who was present but who did not testify at the trial, received a laceration on the left cheek and eye, and numerous small lacerations on his cheeks. The cartilage was jammed together on the fifth finger of his right hand. At the time of the trial he had a little scarring above his left eye, and a slight limitation of motion in the fifth finger of the right hand. Richard Button who was present at the trial was two years old. He had lacerations below the hair line in the middle of his forehead about one and a half inches long. He had received a laceration about three-quarters of an inch above his nose. On his chin he had a bad laceration starting about a half inch below the lower lip, extending toward the point of his jaw, with some destruction of tissue. He had suffered some concussion, shock, and several of the scars on his face were permanent. It was doubtful if plastic surgery would eradicate them. The scar on his chin was about an inch in length, and the one on the cheek ragged and with a disfigurement which would extend about three inches. The scar on his forehead was about an inch in length. The nature and extent of the injuries to the plaintiffs Button were testified to by Drs. C. O. Edwards, Ralph W. Nauman, and Joseph Raider.

Orval L. Tatro, driver of the Meyer truck, testified that he was employed by the defendants Meyer on the date of the accident. On that day he was going to make a delivery to the restaurant-tavern. He was driving about thirty-five miles an hour for about a quarter of a mile prior to the time of the accident. As he approached the intersection, he saw the Thomas truck approaching from the opposite direction. When he first noticed it,

it was three or four blocks away, and his car was approximately the same distance west of the intersection. He judged the speed of the Thomas truck at that time at about thirty-five miles per hour. He continued easterly until he got near the driveway of the restaurant-tavern where he was going to make a left turn. When he was about a hundred fifty feet from the driveway, he applied his brakes and slowed down to ten miles an hour and signalled for a left turn. About the same time as he applied his brakes, he reduced his speed. Tatro started to make his turn. His direct testimony is as follows: "I would say the front wheels were approximately five feet over the center line, about half across the north lane, the north half of the road. The other truck was then approximately a hundred seventy-five feet from the entrance into this tavern, couldn't have been over twenty-five feet from the stop light. In my opinion I figure it must have been going then between forty-five and fifty. I immediately accelerated my truck then to get off the highway to avoid a collision." He further testified that after the rear of his vehicle cleared the north edge of the pavement, the other truck was just passing to the rear, in the south lane of traffic, and that there was about twelve to fifteen feet between the rear end of his vehicle and the other truck. Shortly thereafter he heard a crash. He further said, "As I approached this driveway in which I turned, I actually made the turn not over twelve feet west of the west edge of the driveway. The driveway goes in sort of a diagonal manner into this establishment. It is rather wide and diagonal. There were no cars in front of me going in the same direction." He further testified on cross examination that his truck is approximately fifteen and a half feet long from bumper to bumper; that the Thomas truck was a hundred twenty-five to a hundred fifty feet from him when he first realized it was going fifty miles an hour. He stepped on the accelerator. He had seen the Thomas truck for some distance and it was hard to estimate its speed. He did not know that the Button car

was behind him. He testified on cross examination by Mr. Dalziel, one of Thomas' Attorneys, that when he started to cross, his arm was still extended, that the other truck was then by the east stop light of the intersection, which was about two hundred ten to two hundred twenty feet away, and that the driveway in which he was turning is a hundred eighty feet from the west stop light. He turned into the west part of the driveway approximately a hundred seventy-five to a hundred eighty feet from the west signal light. His truck is eight or nine feet high and seven feet wide. He started to make his turn about ten to fifteen feet west of the driveway.

Dale W. Thomas again testified in his own behalf as follows: His cargo of soft drinks was not roped on because his truck was not full. He saw the Meyer truck, and when he got approximately fifteen feet west of the light, the Meyer truck turned west into Thomas' traffic lane. He saw the Meyer truck driver put his hand out as he crossed the center line. When he saw he wasn't going to be able to stop before he hit the Meyer truck, he turned into the center of the highway, and after the Meyer truck cleared his vision, he saw the Button car behind it at a distance of about thirty feet in the south half of the road. He testified further: "I turned my truck back to the right to clear the car when I first saw that the car was south and west, mostly west, of me. The truck was moving to the west and was in the center of the highway. If my truck had continued in the same direction, it would have struck the car head on. I turned the truck that moment back to the right, short, and I felt like the seat was coming up on the right side. It was the load shifting over to the left. I thought my front hit the fender of the car, my left front bumper. It did not hit; it slid by. As I turned short to the right, I felt the thing tipping to the left. I turned to the left. It had no effect. The truck upset on its left side, and afterwards that side of the stake body was not in place. It had broken off, and the cargo scattered on the top of the Button car. My truck stopped across the north side of the pavement, with the front wheels off on the shoulder, and the back

wheels on the pavement. It was headed practically with the pavement, only the front was a little further to the right than the back. I crawled out the right door." He further testified that he looked at the pavement after the accident, and saw that his truck had left tread marks over and on the highway, and he said, "They looked real black and scuffed up. The tread was discernable in places and the tar was kind of lifted." He further testified that: "My opinion of the speed of my truck at the time the Meyer truck first started to move across the center line of the road, I would say is twenty-eight miles an hour." He then testified as to the damages to his truck. The repair bills amounted to \$311.21 and other damages paid the repairman amounted to \$265.33. He also testified as to other damages. The various amounts for loss of cargo and loss of use of truck amounted to several hundred dollars. He further testified on cross examination that his brakes were in good mechanical condition, that the truck had four dual wheels on its rear and two front wheels, all of which had what is commonly known as six wheel brakes.

James Stewart Baker testified on behalf of Thomas as an expert witness. His testimony purported to give various opinions in answer to a hypothetical question with reference to the effect and nature of the skid or print marks of the Thomas truck. We shall discuss later in this opinion our conclusions with reference to the competency of his testimony.

Appellants Meyer urge as one of the grounds for reversal of the judgments against them, that the trial court erred in refusing to grant their motion for judgment notwithstanding the verdicts, and for refusing in the alternative to grant them a new trial, insofar as the judgment in favor of the appellees Button is concerned. They and Tatro also contend that the court likewise erred in refusing to grant their similar motions as to the judgment obtained by Dale Thomas against them. The questions presented in both motions are whether or not the verdicts of the jury finding appellants

Meyer and Tatro guilty are manifestly against the weight of the evidence. The jury evidently believed that the appellants Meyer's driver was negligent in failing to yield the right of way to Thomas as provided by the Statute (Ill. Rev. Stat., 1949, ch. 95 $\frac{1}{2}$, sec. 162). The jury must have also believed from the evidence that Thomas at the time was exercising ordinary care for his own safety. They also found by their verdicts that Thomas went into a place of peril without fault on his part, and used such care as a reasonable prudent person would have used under the same circumstances. The jury must also have believed that the negligence of appellants Meyer and Tatro was the proximate cause of the injury to both the Buttons and Thomas. ✓

The appellants Meyer cite as authority Harrison vs. Dingheim, 350 Ill. 269, and Fina vs. Richardson, 293 Ill. App. 133, as being directly in point. These cases involve factual situations where the parties were seeking to recover where cars pulled out from the curb and the other party was forced over into the other lane of traffic, the court holding that the driver should anticipate such perils on busy thoroughfares, and holding that the driver who went into the wrong traffic lane could not recover or might be liable. These cases are quite different from the case here. The accident in question happened in a rural area where the situation is quite different than a busy city street. The view was unobstructed. Thomas had a right to assume that the driver of the Meyer truck would observe the law and not make a left turn in front of him. Even though Thomas were operating his truck at a rate of fifty miles an hour this might not in itself constitute negligence. (Schachtrup vs. Hensel, 295 Ill. App. 303; Pittman vs. Duggan, 336 Ill. App. 502.) From the skid marks or tire prints it is possible that the Thomas truck was approximately one hundred feet from the Meyers' truck when Thomas first observed the left turn being made. Considering the fact that it was in the open country, this would not be conclusive against Thomas that he was guilty

of negligence. We cannot say our judgment is better than the jury's on that question. It is within their province to decide this and we do not believe their findings should be disturbed. ✓

The case of Strunk vs. Stronberg, 326 Ill. App. 265, is a case involving the rights of parties in an automobile collision where a left turn was made. The case was appealed to this court. On page 271 of the opinion we said: "There is no direct evidence nor facts nor circumstances in evidence from which the legitimate inference may be drawn that the defendant knew or by the exercise of reasonable care could have known that the driver of the Chambers car was about to drive his car into the British Lane at the time the Stronberg car approached the intersection. The driver of the Stronberg car was not bound to anticipate that the Chambers car would be driven in front of him in his lane of travel. He was entitled to count on the assumption that the driver of the Chambers car would yield him the right of way. It is no answer to this proposition to reply that the driver of the Chambers car used his best judgment to determine if he had sufficient time to turn and pass safely in front of the other car, considering the distance the cars were from each other, and the speed of the car coming towards him."

So here it is not unreasonable to assume that Thomas thought and would have reasonable right to think that the driver of the Meyer truck would yield the right of way. The evidence here was highly conflicting, and the jury had a right to determine the weight and credence to be given to the testimony. They had the opportunity to see and to hear the witnesses as well as did the trial judge. As was said in Oswald vs. Grand Trunk Western Railway Company, 283 Ill. App. 86, at page 94: "As stated by our own Supreme Court in the case of People vs. Hanisch, 361 Ill. 465, 463: 'Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the

||
✓

weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." We cannot say that the verdicts of the jury in this case insofar as the Buttons and Thomas are concerned are manifestly against the weight of the evidence. }

Appellants Meyer and Tatro urge as error that the verdict in favor of Dale Thomas as plaintiff and against Meyer and Tatro is a compromise verdict; that it shows conclusively that the case was not given careful consideration by the jury, and therefore this verdict should be reversed as against Meyer and is also ground for the reversal of the Button verdicts. The verdict in question in favor of Thomas was in the amount of \$650.00, and the damages alleged and proved by Thomas included various amounts from \$105.00 to \$311.00, totally different sums, none of them being the amount of the verdict.

Appellant Thomas is not complaining about this verdict. The law is well settled that one against whom a judgment has been rendered cannot be heard to object upon appeal that the judgment was for too small an amount.

(Becker vs. the People, 164 Ill. 267; Florsheim vs. Dullaghan, 58 Ill. App. 593; Rauen vs. Chicago Railways Company, 205 Ill. App. 464.) It is true that where the verdict is for a nominal sum and the proof shows that the party is entitled to a much larger sum, the party then aggrieved is entitled to have the verdict set aside as not being consistent with the evidence in the case. Illustrative of this is Wachsmuth vs. Flanagan, 335 Ill. App. 311, where the counterclaimants were awarded the sum of \$2.00 and this court held that this was evidence that the case did not receive the proper consideration of the

jury and the issues should be submitted to another jury. The position of appellants Meyer and Tatro as to the size of Thomas' verdict is not tenable for the reasons above expressed.

Appellants Meyer and Tatro contend that the verdicts in favor of Helen, Richard and James Edward Button were excessive. Their injuries are detailed in the testimony heretofore mentioned in this opinion. It cannot be seriously contended that the judgment in favor of James Edward Button is excessive. He was injured, sustained pain and suffering, and a thousand dollars was not excessive. As to Helen Button, without again reviewing the testimony as to her injuries, it is apparent that she did suffer serious injuries, had great pain and suffering, and has not yet fully recovered. The sum of \$5000.00 awarded to her in our opinion cannot be considered as excessive. As to Richard B. Button, to whom the jury awarded the sum of \$10,000.00, his injuries as above narrated consisted of numerous permanent scars on his face, a concussion, and a great deal of pain and suffering. The jury had a right to consider and must have considered the permanent scars that this two-year-old boy received from his injuries. Permanent disfigurement of a person's face may be properly considered by the jury as an element of damages. (Simon vs. Kaplan, 321 Ill. App. 203.) The fact that this young man with his face scarred might be handicapped throughout his life in obtaining work is also a proper element to be considered by a jury in awarding damages. (Ford vs. Friel, 330 Ill. App. 136; Budek vs. City of Chicago, 279 Ill. App. 410.) There is no accurate yardstick to measure damages with reference to pain and suffering and disfigurements. Such damages being unliquidated, verdicts of juries are not to be disturbed as being excessive unless the court can say that the amounts awarded are so outrageous that the court knows that justice has not prevailed.

It is the law that the courts will take judicial notice that the value of the dollar has diminished nearly fifty per cent in the last ten

Years, and with this in mind it appears to us, considering the injuries sustained by this two-year-old boy, that his verdict and the other verdicts are not excessive. (Petersen vs. General Rug and Carpet Cleaners, Inc., 333 Ill. App. 47; Howard vs. Baltimore and O. C. Terminal R. Co., 327 Ill. App. 83.)

The appellants Meyer contend that counsel for plaintiffs Button indulged in prejudicial argument to the jury which was so inflammatory that it requires that the court grant them a new trial. All of the argument is not abstracted, and without examining the entire record it is difficult to tell whether some of the remarks alleged to have been made were brought on by remarks of other counsel. Sometimes an argument that is inflammatory may have been in reply to the argument of other counsel of the same character, and would not require a reversal of the case on that grounds. (Farley vs. Security Insurance Company of New Haven, Conn., 331 Ill. App. 443.) In the argument in this case we feel that some of the alleged inflammatory argument of plaintiff's counsel may have been justified. The Supreme Court in Walsh vs. Chicago Railways Company, 303 Ill. 339 at 351, discussing the question as to the limitation of counsel in his argument, said: "The interests of public justice require counsel should not be subjected to unreasonable restrictions in this regard, citing authorities." After considering all the arguments that are abstracted, we cannot see anything that could be considered so impassioned and inflammatory as to prejudice the jury. We certainly do not approve of everything that was said by all counsel, but we do not believe that a new trial should be awarded on this ground.

Appellants Meyer urge that the court erred in giving and refusing certain instructions. They urge that the court erred in giving appellee Thomas instruction No. 40. This instruction is sometimes known as the "sudden danger instruction," and in substance states that if without fault a person is confronted with what would appear to an ordinary careful person to be danger, then he is not required to use that same degree of care that

he would use under ordinary circumstances, but is only required to use that care that would be used by an ordinary careful person taking such danger into consideration. Under the facts in this record this instruction was properly given. The party is entitled to have the jury instructed as to the law on the facts applicable to his theory of the case. Here there is sufficient evidence for the jury to consider that Thomas, without fault, was confronted with a sudden emergency. The court was correct in giving this instruction which has been approved by the Supreme Court: (Kavanaugh vs. Parrot, 379 Ill. 273).

The cases cited by appellants Meyer (Blumb vs. Getz, 294 Ill. App. 432; Sullivan vs. Heyer, 300 Ill. App. 599) are not applicable as they either omitted some of the necessary elements required in this type of instruction, or the factual situation did not require them to be given. Criticism is leveled at instruction 44 given on behalf of Thomas. This instruction in substance states when a wrong is committed by an agent while pursuing his employer's business, the employer will be liable for the wrong although it is done without the employer's knowledge or consent, unless the wrongful act is a willful departure from such employment or business. This instruction in the identical language as given here was approved in the case of Reilly vs. Peterson Furniture Co., 314 Ill. App. 46, and we think it was properly given here. The refusal of instructions 20 and 27 was proper. These instructions had been covered by other instructions. The court is not required to instruct the jury more than once on a particular subject. (East St. Louis Railway Co., vs. Zink, 229 Ill. 180; Schluraff vs. Shore Line Motor Coach Co., 269 Ill. App. 569.) Criticism was also leveled at instructions 10A, 10B, 10C, 11, 12, 13 and 15 on the ground that they are repetitious. In view of the many plaintiffs Button in this case it was proper to give separate instructions as to the damages for each as they are to be considered as separate

parties. To lump all their damage instructions together would have been error. (Schultz vs. Gilbert, 300 Ill. App. 417.) The jury were fully and correctly instructed by numerous instructions as to the law, and we find no error as to the refusing or giving of any of them.

James Stewart Baker appeared and testified as a witness for Thomas. He was examined by Mr. Dalziel, one of Thomas' attorneys, as an expert witness. ✓ He testified that he had had years of experience in the examination of skid marks arising out of automobile accidents; that he had investigated numerous accidents, ran many tests, and was able to form an opinion as to the speed of a motor vehicle by an examination of the tread or skid marks that it left on a paved or asphalt highway. No objection was made to his qualifications. He was then permitted and asked to examine, without objection, plaintiffs Button's exhibits 4, 7, and 10, which had been admitted in evidence. Button's exhibit 4 shows the highway at the scene of the accident. Examination of it does not disclose any skid marks or tire prints applicable or referred to in the testimony of other witnesses. Button's exhibit 7 shows the highway adjacent to the place of the accident, and the Button car as it appeared after the accident. It shows tire marks or skid marks for some short distances from the Button car. These skid marks or tire marks had been located and described by other witnesses appearing at the trial. From an examination of the tire marks, it appears it is impossible to tell or describe the same from the exhibit. Plaintiffs Button's exhibit 10 shows the skid marks or tire print marks described by other witnesses. These marks commenced east of the Button car and extended in a westerly direction across the center line to the Button car. An examination of these tire marks discloses that the prints of the tire or skid marks are quite discernible in the foreground of the picture, but not in the background where they extend across the center line into the Button lane of traffic. It is impossible to tell much about them from the exhibit.

The witness was asked, without objection, a long hypothetical

question covering the facts on Thomas' theory of the case, and was asked if from the hypothetical question and the examination of the exhibits he had an opinion as to whether the marks were skid marks or print marks. He answered that they were typical tire prints, because (in substance) they showed no smears. He was then asked, in substance, does the description of the tire marks indicate that the car was under control? On objection this answer was stricken.

During the course of the examination Mr. Fitzpatrick, who was appearing as attorney for the plaintiffs Button, made no objection to any of the expert testimony. The witness Baker was then asked whether or not he had an opinion based upon a reasonable degree of scientific certainty as to the significance of the curving of the hypothetical tire marks. The witness said he did have an opinion. An objection was interposed by Mr. Carey, attorney for the defendants Meyer. The court overruled the objection, and the witness stated that such facts indicated that the car was being steered. The witness then volunteered the reasons for his opinion. Mr. Carey then moved the answer be stricken, and the court permitted the answer to stand. The witness was then permitted to answer, over objection of Mr. Carey, that the tread marks indicated to him that the tire was rolling or turning rather than sliding and leaving a smear. The witness was then asked, assuming the same hypothetical facts, have you an opinion based upon a reasonable degree of scientific certainty as to whether or not the hypothetical marks would result if the truck was travelling at a speed of twenty-eight miles per hour when the brakes were applied? The witness replied he had such an opinion: "Might or could. Yes."

Defendants Meyer urge that the admission of this testimony is reversible error. The reasons assigned are first that the admission of this testimony is not permitted under the law because the facts upon which the witness testified are facts of common knowledge by every one; second, that

permitting the witness to testify that the car was being steered is tantamount to permitting a witness to testify that the party was not guilty of negligence, which invades the province of the jury, as that is the ultimate question for them to decide, and not for a witness to decide for them.

It has been held reversible error to permit a witness on a hypothetical question to testify that a tank car was not "safe," (*Ryerson vs. Bankers Life Assn.*, 183 Ill. App. 194) as this is an invasion of the province of the jury whose task it is to determine this ultimate question. (Opinion Evidence in Illinois, King and Pillinger, page 296.)

Yarber vs. Chicago & Alton Ry. Co., 235 Ill. 589, is a case involving the question of whether a witness would be permitted to testify as to alleged unsafe methods used whereby an employee was injured. The Supreme Court held such evidence was not competent and its admission was reversible error. The court says on page 593 of the opinion: "It is assigned for error that the appellee was permitted to introduce in evidence the opinions of witnesses as to whether the method of raising ~~the~~ car was reasonably safe. Opinion evidence is admissible only upon subjects not within the knowledge of men of ordinary experience, and upon the ground that the facts are of such a nature that they can not be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them in their relations and comprehend them sufficiently to form accurate opinions and draw correct inferences from them on which to base intelligent judgments. The opinions of witnesses should not be received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the jury. (*Linn vs. Sigsbee*, 67 Ill. 75; *City of Chicago vs. McGivin*, 78 id. 347; *Pennsylvania Co. vs. Conlan*, 101 id. 93; *Hopkins vs. Indianapolis and St. Louis Railroad Co.* 78 id. 32.) The subject matter of inquiry here

is not of such a character that only persons of skill and experience in it are capable of forming a correct judgment about it. There was no complicated machinery, no question of science or skill. If the expert witness did not know all the facts his opinion would be only a guess. If he did know them, they could be detailed to the jurors and they would be as competent to form an opinion as the witness. This evidence should not have been allowed to go to the jury."

The basis of this opinion appears to be that the testimony offered was an invasion of the province of the jury of the ultimate fact of negligence to be determined by them, and further that the testimony was of such a nature that ordinary persons would understand it without the necessity of using expert evidence.

Hoffman vs. Tosetti Brewing Company, 257 Ill. 185, was an action wherein a teamster for a brewing company sought to recover damages for injuries suffered when a wheel of a wagon which he was driving but which belonged to his employer came off. The injured party, the plaintiff, in this case sought to introduce the expert testimony of three blacksmiths to the effect that the failure of the wheel to spin after the axle was greased was either because the boxing was too long, because the wood extended over the boxing and rubbed against the nut, or because the boxing fitted too tightly upon the axle. They were further permitted to testify that the friction from either of these causes produced heat, and could have caused the nut to become loosened or broken. The court says on page 189 of the opinion: "Opinion evidence is admissible only upon subjects not within the knowledge of men of ordinary experience, and upon the ground that the facts are of such a nature that they cannot be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them in their relations and comprehend them sufficiently to form

accurate opinions and draw correct inferences from them on which to base intelligent judgments. The opinions of witnesses should not be received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the jury. -- Linn vs. Sigsbee, 67 Ill. 75; City of Chicago vs. McGivin, 78 id. 347; Pennsylvania Co. vs. Conlan, 101 id. 93; Hopkins vs. Indianapolis and St. Louis Railroad Co. 78 id. 32. (Yarber vs. Chicago and Alton Railway Co. 235 Ill. 539.) As suggested by plaintiff in error, it does not require an expert to tell a jury that when pressure is taken off a wheel by being jacked up and the wheel will not spin when turned by hand it binds somewhere. As to where this wheel bound was capable of being ascertained, and the whole circumstance could have been made intelligible to the jury by the mere proof of the facts. That the wheel would bind if the boxing was too long, or if the wood of the hub projected over the boxing so as to rub against the nut, or if the spindle was too big for the boxing, required no expert or opinion evidence to demonstrate. Neither did it require expert or opinion evidence to show that friction will heat metal and cause it to expand. These are facts within the knowledge of every man of ordinary intelligence. Had the testimony of these witnesses been confined to these facts no harm would have resulted, but they were permitted to go further and were allowed to theorize and speculate at great length as to the probable manner in which the nut became separated from the spindle. In the absence of any proof that such a condition existed, they were allowed to speculate as to the result where the wood of the hub projected slightly over the end of the spindle so that the nut came in contact with the wood when screwed up tight, and also, in the absence of any proof as to such a condition, were allowed to speculate as to the result in case the boxing was too long for the spindle and thus came in too close contact with the nut when screwed on tightly. Whether this nut came off as a result of the defect in the wagon or in some unaccountable way for which the plaintiff in error

was in nowise responsible was a close question, and the introduction of this opinion evidence was prejudicial. For this error the judgment must be reversed."

It appears to us from the reasoning of the above cases and the law expressed therein, that to permit the expert witness here to testify that Thomas' truck was being steered is tantamount to permitting the witness to testify that he, Thomas, was not negligent, and is permitting the witness to give his opinion on an ultimate fact which is for the jury.

In *Mortvedt vs. Western Austin Co.*, 320 Ill. App. 337, abstract opinion, decided by this court, it was urged that the court erred in refusing to allow the witness to testify from the photograph that the marks shown on the photograph were skid marks. The photograph had been introduced in evidence. The court says on page 13 of the opinion: "The jury had this photograph before them and they also heard the witnesses say that on the night of the accident they saw skid marks on the pavement." The court further says on the same page of the opinion: "Under such circumstances, we think the court properly held that it was a question of fact for the jury and not the witness to determine what the marks on the photograph represented."

Applying this rule to the instant case, it is our considered opinion that it was for the jury to determine from the photographs the nature and character of the skid marks or tire prints shown therein. To permit the witness to do so served no useful purpose, and it was an invasion of the province of the jury. As above mentioned, from an examination of the photographs by the court, it appears that it would be impossible to tell from the exhibits which are a part of the hypothetical question, whether or not at least a portion of the marks are skid marks or tire prints. While the expert witness testified that he was able to ascertain and answer the many questions asked him, it appears to us that his answers were based upon factors unknown and unascertainable, and were upon such questions of common knowledge that his answer could only confuse the jury and cause them to think and act upon

his answers as being that of a learned man who must know all the answers to all the questions of such a nature.

We believe that the above rules of law require a reversal of the judgment of Dale W. Thomas against the defendants Meyer. As to the judgments rendered in favor of the Buttons, we believe they should be sustained. The evidence in the record clearly proves that the jury was correct in rendering a verdict of guilty against the defendants Meyer insofar as plaintiffs Button are concerned. We do not believe that the incompetent evidence introduced on behalf of Thomas is such that it would require a reversal of the Button judgments. The fact that the factual situation might give the jury the right to return a verdict of guilty against both the Meyers and Thomas, cannot be taken advantage of by the defendants Meyer. In effect if there had been a guilty verdict as to both of them, it would have been a finding by the jury that they were joint tort feasons, and both liable for the injuries to the plaintiffs Button. The jury might have taken the view that the defendants Meyer were the most guilty, and hence refused to return a verdict against Thomas. The defendants Meyer cannot complain about this. This is based on the theory that if two persons commit a wrong and one of them is sued, the wrongdoer who is sued cannot complain because the other wrongdoer is not made a party to the lawsuit. Here it is true Thomas was made a party, and so far as the suit against both Thomas and Meyer is concerned, the jury found Thomas not guilty. The fact that in another lawsuit consolidated with this one they found him likewise not guilty would not necessitate under the law that the defendants Meyer have a new trial. It is therefore the opinion of this court that the judgment entered in the case of the plaintiffs Button against the defendants Meyer be affirmed, and the judgment in the case of the plaintiff Thomas against the defendants Meyer and Tatro be reversed and remanded.

Judgments affirmed in part and reversed in part,
and remanded,

59

A

45250

VAUGHAN'S SEED STORE, an Illinois corporation, Plaintiff below,

Appellant,

v.

J. C. McDONALD, Defendant below,

AMERICAN BULB COMPANY, a corporation, Garnishee below,

Appellee,

PAN-AMERICAN FLOWERS AND BULBS, LTD., Intervening Petitioner below,

Appellee.

345 I.A. 85

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding based upon plaintiff's judgment against McDonald for \$60,000. Plaintiff garnisheed the American Bulb Company to recover about \$18,000 due on the account of the Pan American Flowers and Bulbs, Ltd., a Mexican corporation, alleged to have been assigned to McDonald. The Mexican corporation intervened and claimed the funds. The issues were tried before a jury, and the result was a verdict against plaintiff, and judgment discharging the garnishee. Plaintiff has appealed.

The attachment writ issued December 16, 1943 and was served the same day on the American Bulb Company (hereinafter referred to as the garnishee). Also on that day, before the writ was served, the garnishee mailed its check to the Pan American company (hereinafter referred to as the intervenor) for \$10,242.42. Garnishee answered plaintiff's

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

1891

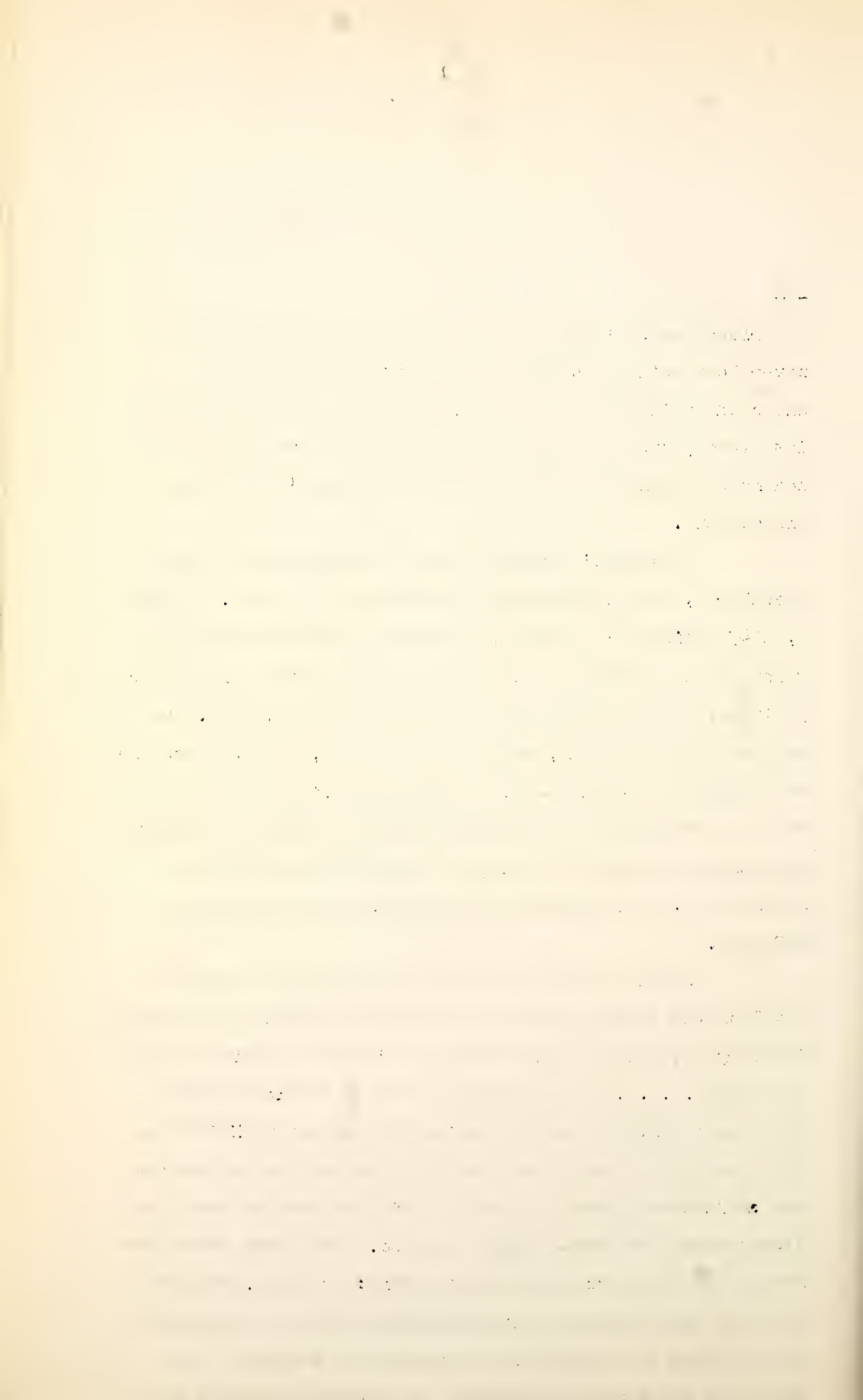
1891

1891

interrogatories stating it had no moneys due McDonald, had never been notified of an assignment to McDonald nor directed by intervenor to pay McDonald the indebtedness due intervenor, and that prior to service of the writ garnishee had made payments to intervenor with McDonald's knowledge and consent.

Plaintiff's judgment against McDonald was entered December 5, 1944 in the amount of \$60,000 and costs. January 9, 1947 plaintiff's motion for summary judgment against the garnishee was denied. January 17, 1947 intervenor filed its petition, claiming \$6,500 due it on December 16, 1943, and denying that the funds, or any part of them, had been assigned or belonged to McDonald. It prayed for a finding that it was sole owner of the indebtedness and for judgment against garnishee for \$6,500. Plaintiff answered that prior to December 16, 1943 intervenor had assigned the account to McDonald.

April 1, 1949 plaintiff's motion for a separate trial of the issues under the intervening petition was denied. February 10, 1950 the jury found the "issues in favor of the garnishee" It returned a special verdict finding that the intervenor did not assign the account to McDonald. The plaintiff contends that denial of the motion to separate was prejudicial error. It argues from the premise that the issues were different. This is not so. The issue under each set of pleadings was basically the same: that is, whether prior to the service of the garnishment writ the intervenor had assigned its account with garnishee to McDonald. In addition, there was the question, as between plaintiff and

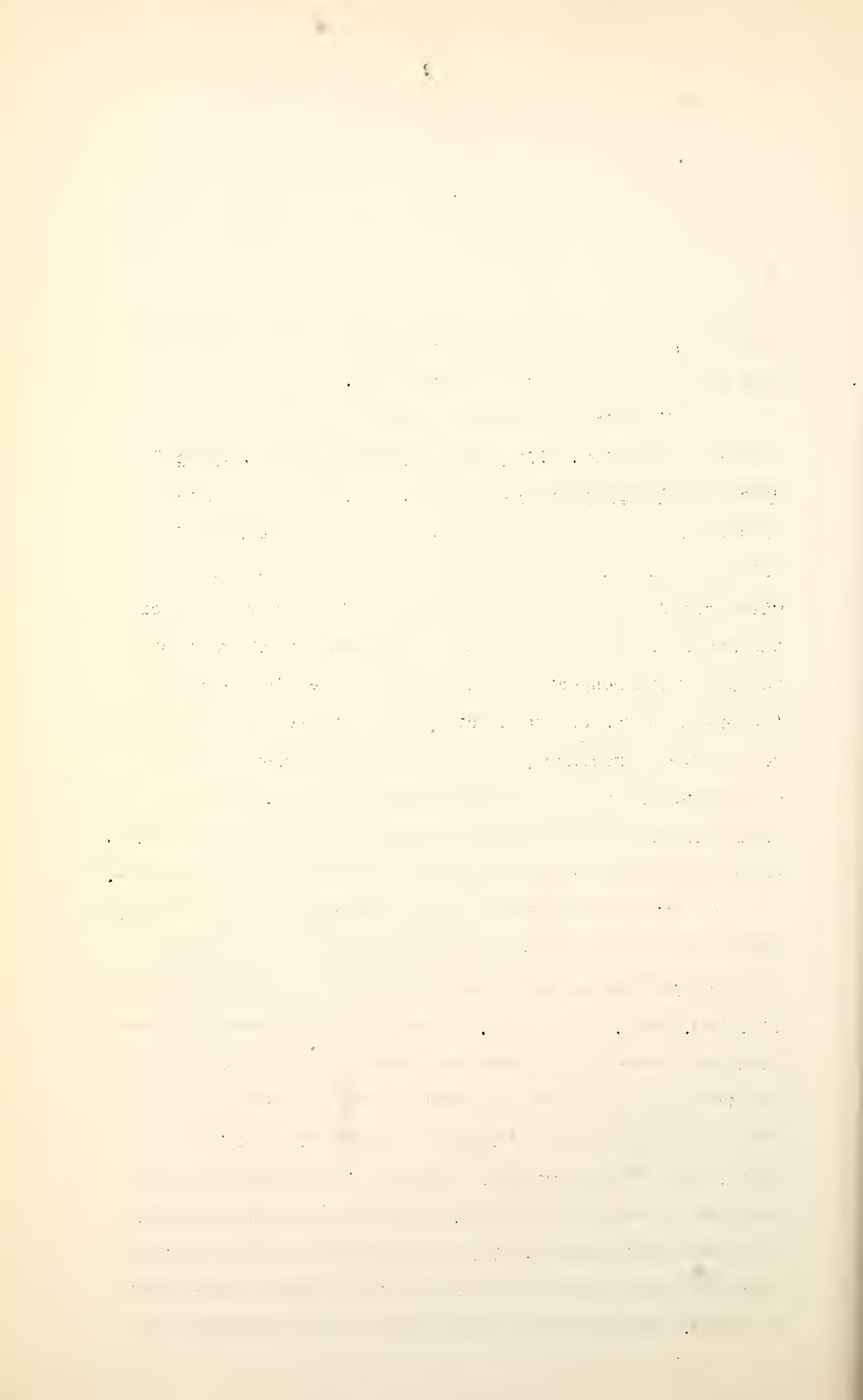


garnishee, whether the latter had notice of the assignment when it mailed the check to intervenor.

We think the ruling involved an exercise of the court's discretion. Pine Tree Lumber Company v. Central Stock and Grain Exchange, 140 Ill. App. 462. Plaintiff argues that it was prejudiced by reason of confusion in the trial arising when the attorney for garnishee examined witnesses for intervenor and because of the similarity of the names of these parties and the necessity of instructing the jury with respect to evidence for or against each. At the trial it was expressly stated that there was no objection to the first procedure, nor to having testimony in behalf of intervenor offered in support of garnishee. We think plaintiff is in no position to complain about the prejudice, and we see no error in the denial of the motion to separate.

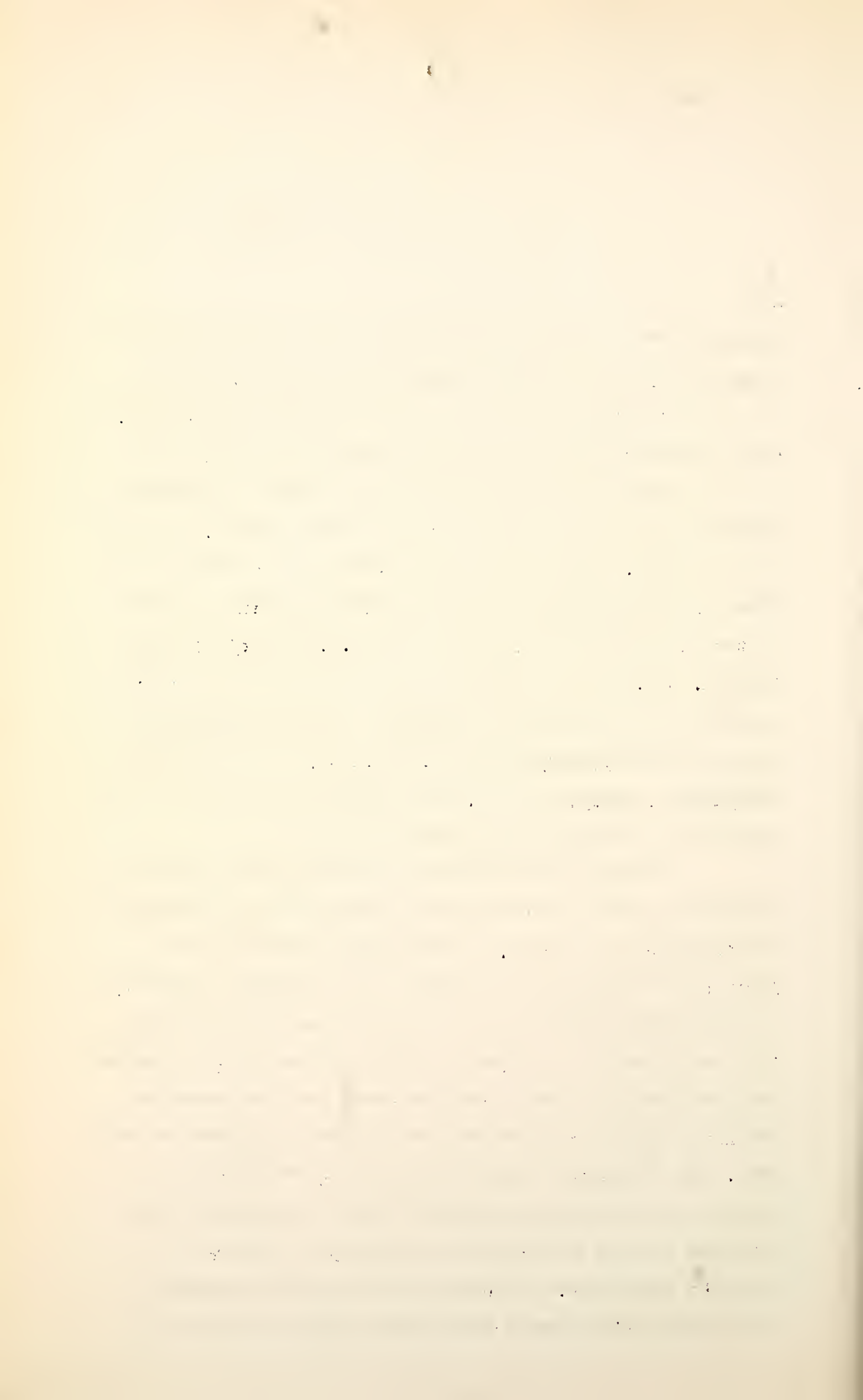
We see no merit in the contention that the judgment should be reversed because the Banco Fiduciario de Mexico was not given notice under section 11 of the Garnishment Act. Ill. Rev. Stat. 1949, chap. 62, par. 11. This section provides that should a claimant of funds in the hands of a garnishee not voluntarily appear to maintain the claim, notice for that purpose "shall be issued" to him in the manner which the court shall direct. Whatever interest the bank had in the account was not made known to the court in the garnishee's answer. Neither the garnishee nor plaintiff requested notice to the bank, nor did the court cause notice to issue. The garnishee recognizes that had judgment been

✓
109.294.



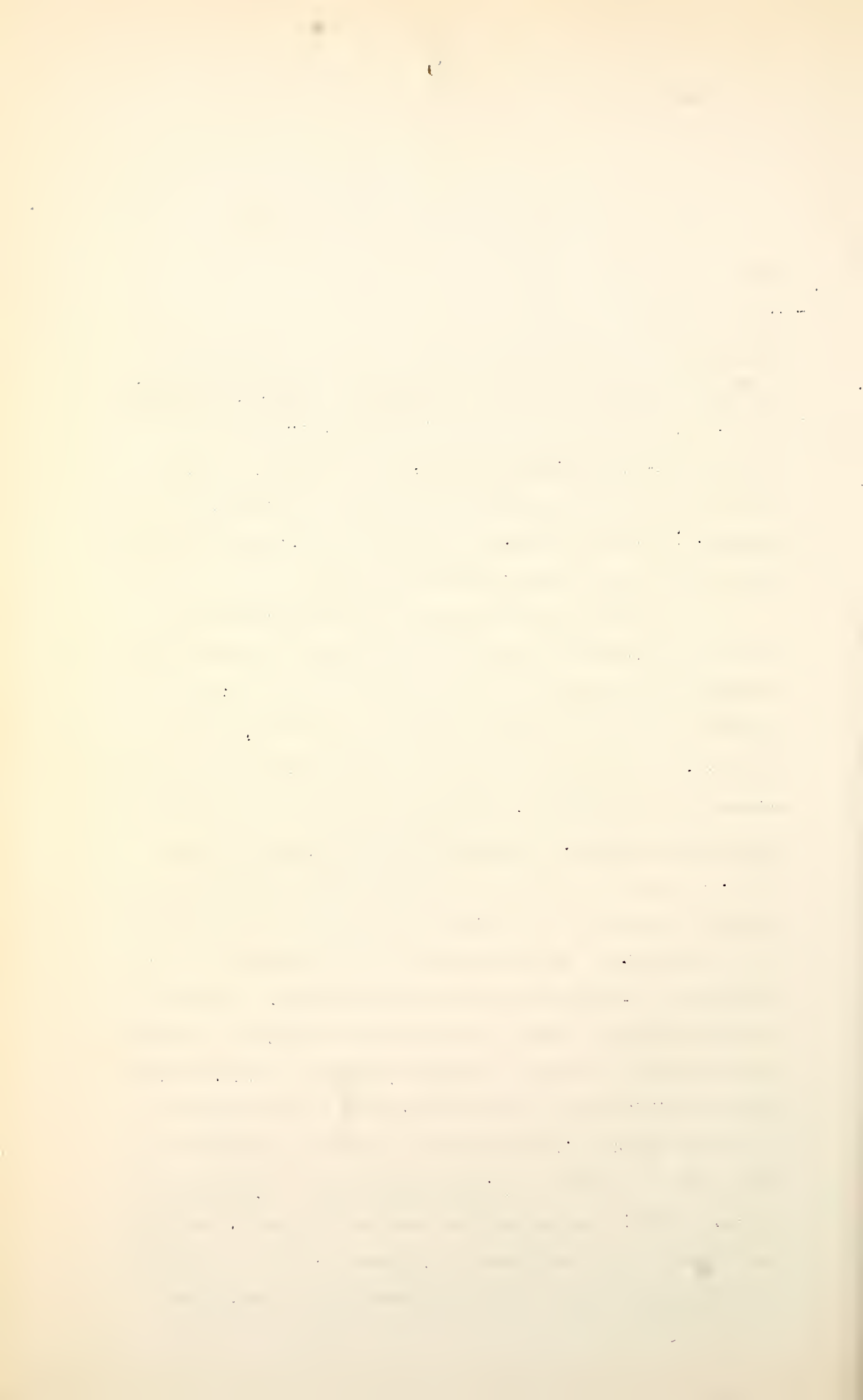
against it and it had not brought the bank's interest to the attention of the court, the judgment against it would be no protection in a suit by the bank. No case has been cited which construes section 11 so that under the circumstances of this case, we would be compelled to reverse the judgment because neither the court nor the garnishee brought the bank into the case. This is not a case where the judgment was in favor of the garnishor with no opportunity given a claimant of the fund to protect himself. See e.g., Siegel v. Moses, 159 Ill. App. 624. It is not a case where the court refused upon motion of the garnishee (Chott v. Tivoli Amusement Co. for the use of Thurston, 82 Ill. App. 244) or the garnishor (Nudelman v. Stern, 315 Ill. App. 215) to cause notice to be issued to a claimant of the fund.

Plaintiff contends that the trial court erred in refusing to grant his motion for a new trial on the ground of misconduct of a juror. In voir dire examination the juror said that he did not remember that Attorney Augustus, a witness for plaintiff who confronted him, was involved in a suit against the juror in 1930; that he did not remember who sued him, but that he won the case; and that Augustus did not look like the man who would do what happened in that case. In its motion for new trial and in affidavits in support of the motion, plaintiff showed that Augustus was attorney for one Roth who sued the juror in 1930 for a broker's commission. We cannot infer from this showing that the juror's answers were false or that he was not a



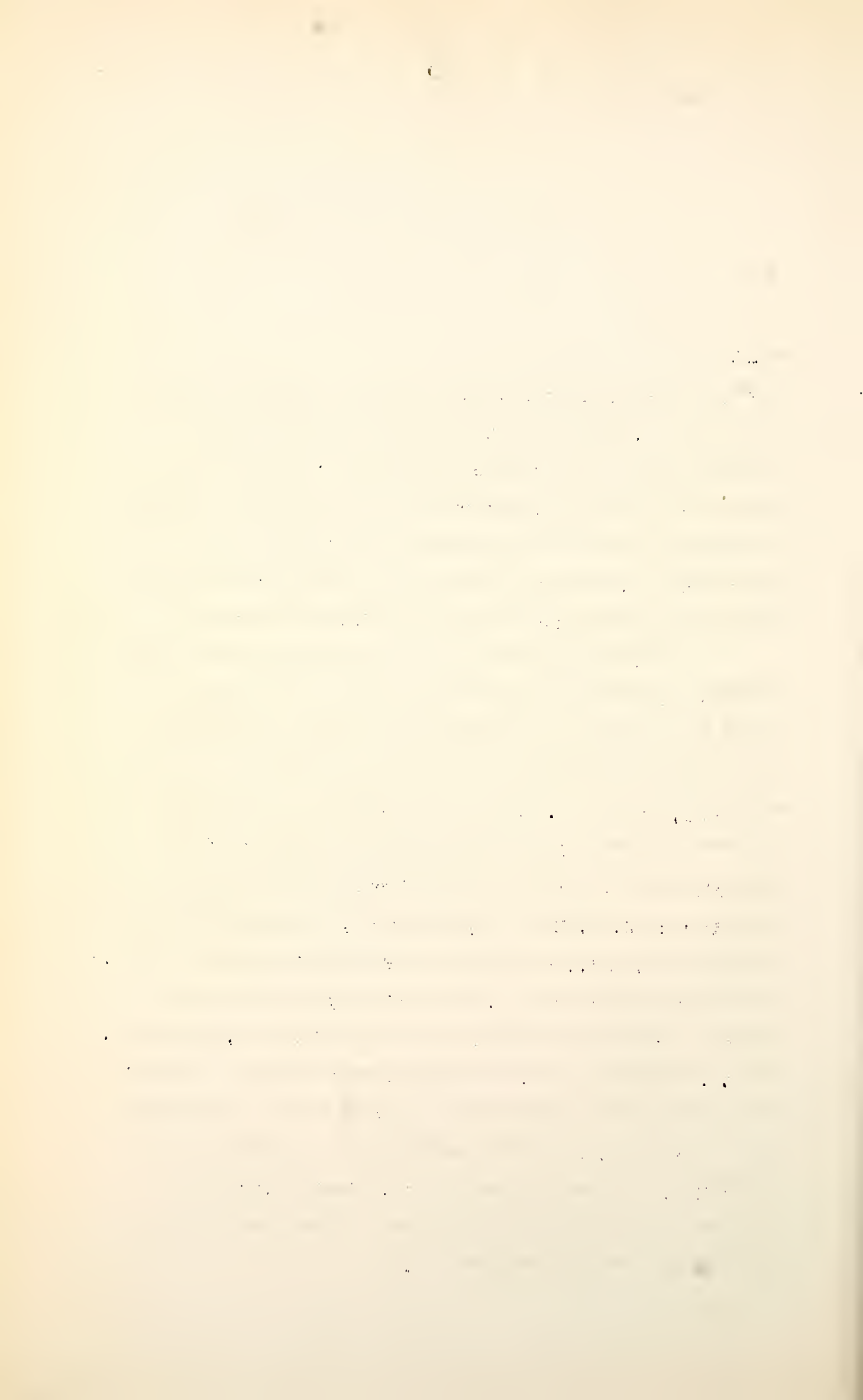
fair juror. It follows that there can be no showing of prejudice from this incident. Nordhaus v. Marek and Newman, 317 Ill. App. 351. An entirely different situation was presented in In re Mesner's Estate, 176 P. 2d 70, where the new trial was granted and the order affirmed, and in Heasley v. Nichols, 80 Pac. 769, where facts admitted showed bias about which a juror answered falsely.

The trial court rejected plaintiff's offer to prove that Augustus in August, 1943 and May, 1944 had conversations with McDonald with respect to the latter's interest in, and assignment to him of accounts by, the intervenor. This was not error. Assuming McDonald was an adverse party (Nudelman v. Stern, 315 Ill. App. 215; Pine Tree Lumber Company v. Central Stock and Grain Exchange, 140 Ill. App. 462, there was no issue between him and plaintiff wherein his interest would be adversely affected by the testimony. As an officer of the intervenor, admissions of McDonald could not bind garnishee. There is no joint interest between garnishee and intervenor so as to make applicable the rule in Lowe v. Huckins, 356 Ill. 360. Neither were McDonald and intervenor sued as partners so as to make the former's admissions admissible against the latter under the rule in Oneida State Bank v. Peterson, 226 Ill. App. 381. The admissions were not offered to explain possession of the assignment by McDonald, but to establish the assignment. They were self-serving as to McDonald's



"interest" in the fund, though adverse to garnishee and intervenor. They were not admissible as inconsistent statements of a party because McDonald's testimony was given as a witness for garnishee, not as a party. Finally, no ground was laid for introducing the statements as impeachment. The same is true of the court's excluding of documentary evidence referring to McDonald's "intent."

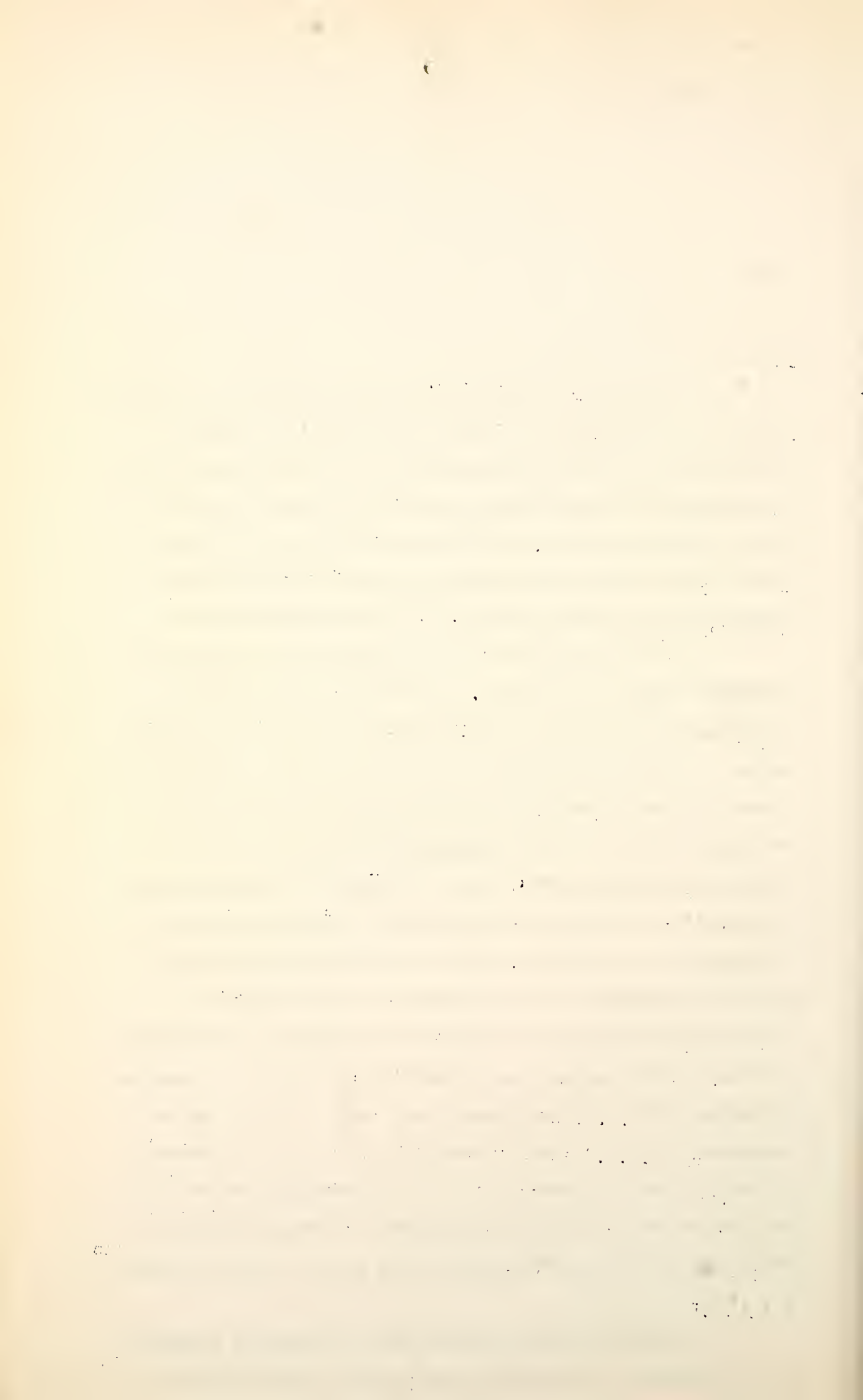
Plaintiff contends that the correspondence establishes an assignment as a matter of law. The letters relied upon were from intervenor and signed by McDonald and Arquesty, Treasurer and Secretary respectively, or by Seeley, President. A letter of September 27, 1943 said "we have" shipped bulbs on which "we have drawn" on the basis of \$20.00 per case, and "your remittance should be made to: J. C. McDonald, Treasurer, Pan American Flowers and Bulbs, Ltd., care of Banco Fiduciario de Mexico" A letter of October 22, 1943 said any amounts "due our company" should be remitted only to McDonald, Treasurer, etc. On December 7, 1943 garnishee wrote McDonald giving the history of the transactions and hoping that the figures were correct, and said "will enclose you a check" as soon as McDonald and Seeley approved. On December 15, 1943 garnishee wired McDonald asking for a return wire of the total amount due Pan American.



At best from plaintiff's point of view, the letters relied on are ambiguous. Directions to remit to McDonald as described in the correspondence did not constitute per se an assignment. Whether there was an assignment therefore was a question of fact. This was recognized by plaintiff at the trial for at its request the court submitted the interrogatory on the question. The jury answered "no."

It is contended that the verdict was against the manifest weight of evidence. In addition to the letters introduced by plaintiff was McDonald's letter as "Treasurer" asking that final settlement be made to the Banco Fiduciario; a draft signed by McDonald and Arouesty for each shipment of bulbs payable to Banco Fiduciario "as per our letter" of September 27; McDonald's letter of November 5 in response to garnishee's of November 2 stating that "you understand. . . all payments . . . will be made to me as Treasurer"; his request of November 10 for authority to draw \$15,000 as "Treasurer"; his letter of November 15 hoping for authority for "us to draw against our account"; his letter of December 13 asking ". . . if you cannot help us by allowing me as Treasurer" to draw on account; his letter of November 22 stating that intervenor was in a predicament and "we are anxious to get any cash outstanding"; and Seeley's wire of December 14 stating, "Expecting bills soon. Need remittance"

There was also evidence that the advance payments on the shipment to garnishee were paid to Banco Fiduciario



for intervenor's account: that the check mailed by garnishee the day the writ was served was indorsed by Arouesty and proceeds paid to Banco Fiduciario for the account of intervenor: and testimony that there was no assignment of the account to McDonald and that intervenor was not indebted to McDonald personally. There was also testimony that the intention of the letters relied on by plaintiff was to pay the account through McDonald as Treasurer to avoid "reckless expenditures of these funds in the hands of others." No objection was made at the trial to the admissibility of testimony of intention. No complaint can be made about it now.

We conclude that the finding on the interrogatory was not against the manifest weight of evidence. This conclusion disposes of the contention that the words "Treasurer" etc. after McDonald's name were mere descriptive personae and that a partner's interest may be garnisheed. We think we have considered all points necessary to our decision.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE AND FEINBERG, JJ. CONCUR.

60

A

45451

RUTH INGLE,

Plaintiff - Appellant,

v.

LaSALLE STREET BUILDINGS, INC.,
a corporation,

Defendant - Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

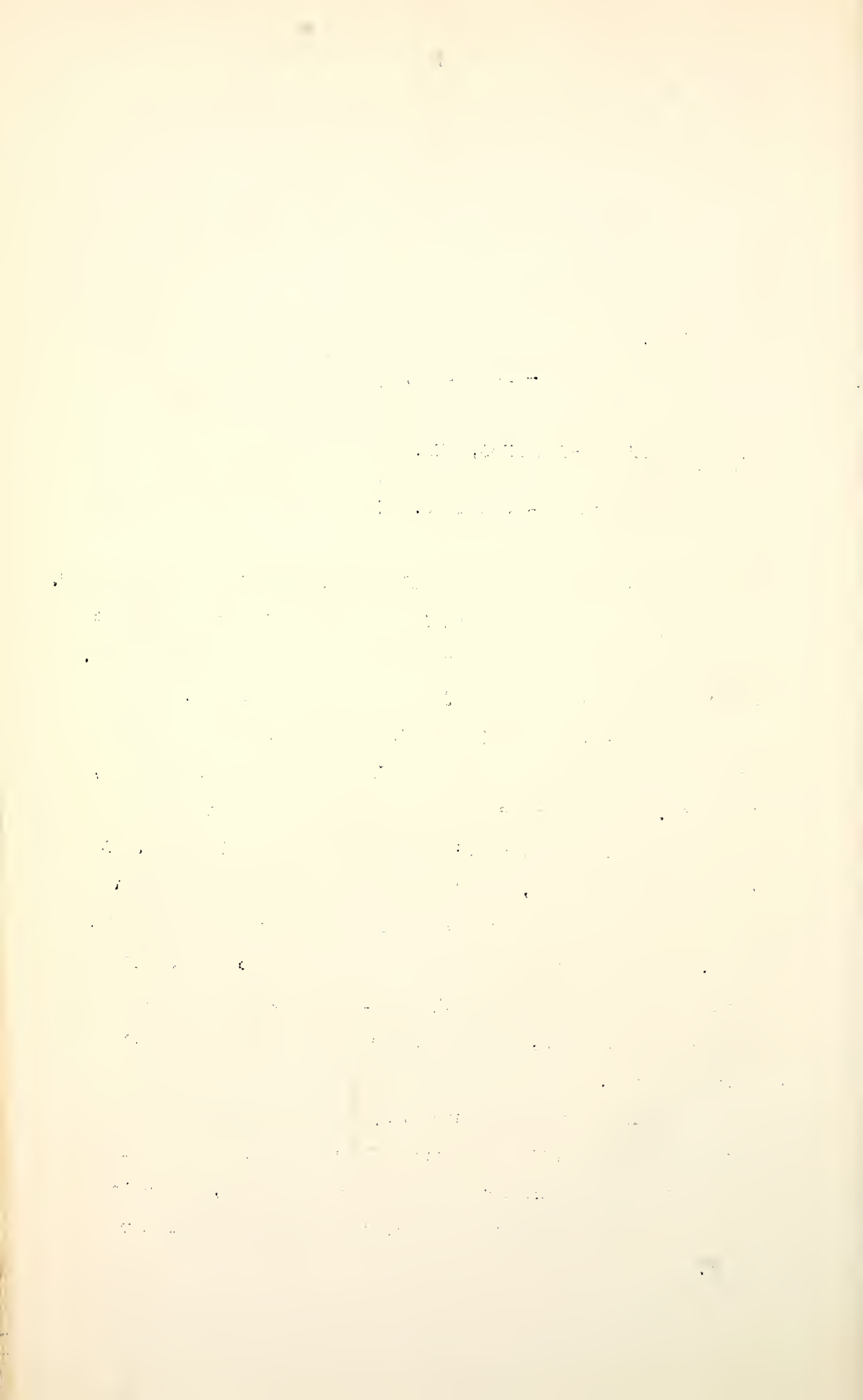
345 I.A. 261

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which verdict was directed for defendant at the close of plaintiff's case. Plaintiff appeals from the judgment on the verdict.

On April 10, 1946 plaintiff was employed in defendant's building at 33 North LaSalle Street in Chicago, Illinois. She slipped and fell in a corridor of the building as she left the ladies' washroom on the 19th floor. She alleged her due care, negligence of defendant in permitting water to accumulate on the corridor floor outside the washroom, that the accumulated water caused her to fall, and that defendant had notice of, and failed to correct, the dangerous condition, thus violating its duty to make the corridor safe.

The question is whether, taking the evidence favorable to plaintiff as true and drawing the reasonable inferences therefrom most strongly in her favor, there is any evidence fairly tending to prove the elements of her case.



Under that rule, these are the facts bearing on the elements of the cause of the accident: About 9:45 A.M. plaintiff's co-worker left the washroom through the exit door and observed on the marble corridor outside the door an accumulation of water about the size of a "filing envelope." She stepped over the wet spot "as best she could" but her shoes touched it. About one-half hour later, plaintiff came through the same door, turned to her left, took a couple of steps, her feet went suddenly from beneath her and she "fell on her face." When she regained consciousness in the washroom, her left leg below the knee and the edge of her skirt were damp.

No witness saw plaintiff fall, she does not know what caused her to fall, and no one testified that the water was there when she fell or where plaintiff was with reference to the spot after her fall. There is only the evidence of the damp leg and skirt. There is no evidence as to how long after she fell the dampness was observed. We think under the circumstances that evidence is an insufficient basis for an inference of the cause. We conclude that on this element of plaintiff's case the question was left entirely to speculation.

In Minters v. Mid-City Management Corporation, 331 Ill. App. 64, the inference was clearly reasonable that the mopping of the floor was the cause of the fall. In Ashburn v. F. W. Woolworth Co., 296 Ill. App. 639, there was no direct evidence of cause, but there was ample testimony that after her fall, the steps upon which plaintiff fell were littered and covered with strips of waxed paper. In Rieck v. Great Atlantic and Pacific Tea Co., 268 Ill. App. 613, there was direct evidence that plaintiff slipped

The following fact bears on notice to defendant of the condition which plaintiff's witness thought "dangerous": there was a watered spot the size of a "filing envelope" on the floor of the marble corridor outside the door. No one testified that the accumulated water remained at the spot for the one-half hour or so before plaintiff fell, and there is no testimony that defendant was told of the condition. There is no direct testimony that the water was there when plaintiff fell, or after she fell. We think the testimony as to the damp knee and skirt is not sufficient basis for an inference to that fact. ✓

On the issue of notice, plaintiff offered to prove that previously it frequently happened that water was spilled at the spot by persons carrying cups of drinking water from the washroom to offices, and that plaintiff's witness had on a number of occasions seen defendant's matron mopping up the spilled water. The court rejected the offer as irrelevant. In Broughton v. City of Lincoln, 260 Ill. App. 240, it was decided that the court properly admitted evidence of the collapse of other sidewalk slabs of Joliet limestone together with expert evidence of the character of that material. The court there relied on City of Bloomington v. Legg, 151 Ill. 9. In the Legg case, the court approved the admission of evidence of previous accidents resulting from the same cause. Neither the Broughton nor the Legg case is applicable in the instant case. Here, the trial court rejected proof which could do no more than show defendant knew that water was frequently spilled at the

spot. There was no proof offered of previous accidents where the cause was common to them and the plaintiff's accident. Moore v. Bloomington, D. & C. R. R., 295 Ill. 63.

We conclude that there was no evidence which fairly tended to prove the elements of the cause of the accident or of notice of a dangerous condition. For this reason, we believe the court did not err in directing the verdict. The judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE AND FEINBERG, JJ. CONCUR.

61

A

45381

CITY OF BERWYN, a municipal corporation,
Appellant,

v.

ERNEST W. MAU and NATIONAL SURETY
CORPORATION, a corporation,

Appellees.

APPEAL FROM

CIRCUIT COURT,

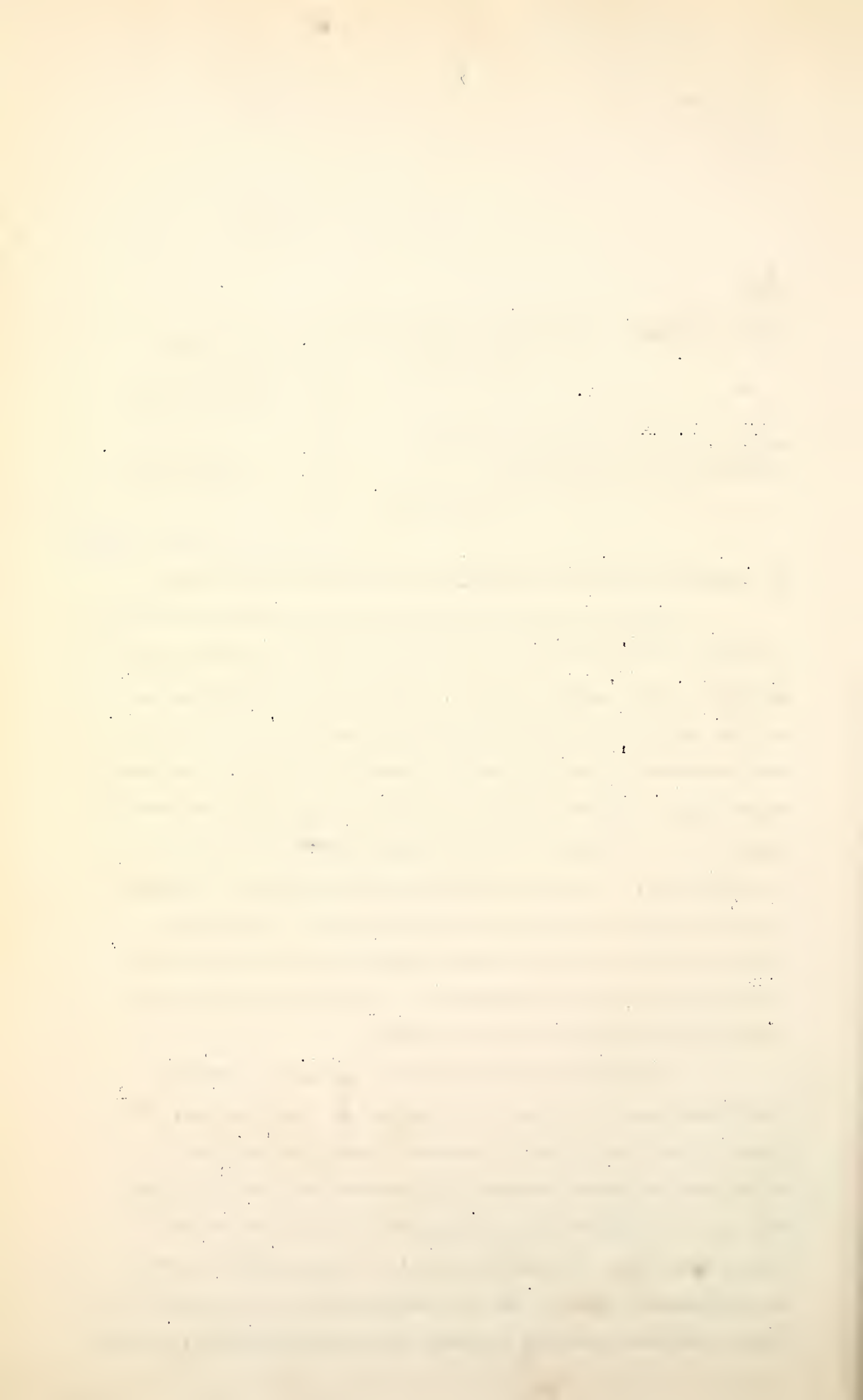
COOK COUNTY.

345 I.A. 86²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action for accounting against defendant Mau, who was treasurer of the City of Berwyn from April 20, 1937, until April 20, 1940, when he resigned, as well as against the defendant surety company, to recover on the treasurer's bond the amount found due, if any, upon such accounting. Alleged illegal diversions of special assessment funds in the possession of the treasurer were the basis of the complaint. Other defendants, who had acted as treasurer of the plaintiff for periods preceding that of Mau, were joined in this action but were dismissed out of the action, and the appeal here is prosecuted only from the decrees in favor of defendant Mau and his surety. ✓

The cause was referred to a master to hear the proofs and make his report of findings of fact and law. The proof offered by plaintiff consists almost entirely of voluminous exhibits representing an audit and compilations made by the witness Nugent, employed by plaintiff as an expert accountant to make the audit. These exhibits cover several hundred pages. At the conclusion of the hearing the master excluded from the evidence all of the exhibits, holding



that they had not been qualified and were not competent evidence to prove the charge in the complaint, and made his report, recommending that the complaint be dismissed for want of equity.

Nugent, the only witness testifying for plaintiff, prepared or had prepared under his supervision the Exhibits A to I, inclusive, which were compilations and calculations made from what records were available in the city treasurer's office, the city clerk's office and the comptroller's office of the City of Berwyn, as well as the county clerk's office. He testified that the original records were too voluminous, which made it impractical to produce and have available at the hearing, but that such records as he had worked with in making his calculations were available at the respective offices named.

Exhibit C covered the period from January 1, 1921, and ending July 31, 1938. Some of the exhibits dealt with that portion of defendant Mau's term of office beginning with April, 1937, and ending July, 1938, and were in part predicated upon the figures and data contained in Exhibit C.

Nugent admitted that Exhibit C was in part made up from an audit prepared by Wolff & Company, who periodically audited the books of the plaintiff for the benefit of one of the largest warrant holders. The audits of Wolff & Company were not offered in evidence, nor was there any evidence of the verification of the Wolff audit or its correctness. The witness admitted that if the Wolff & Company audit was incorrect, the exhibits representing his audit would have the same errors.

The witness further admitted that the items relied upon as illegal diversions could not in most instances be verified by original checks or vouchers, because they were missing. He also admitted that certain records of the City of Berwyn were missing when Exhibit C was prepared, and that some of the records of plaintiff were so damaged by water as to make them illegible. He testified, "Due to the destruction of some of the records and other records which have been so damaged by water as to make them illegible and also due to the incompleteness of other records, we have been prevented from ascertaining certain details which otherwise we would have been able to present."

Exhibit C was prepared in part from the records of the county clerk and comptroller's office during the periods in question. These records, over which defendant Mau was not shown to have any control, were not authenticated or verified to support the compilations made by the witness.

It is admitted by plaintiff on this appeal that defendant Mau made no illegal diversions of the special assessment funds in question to his own personal use or gain, but that such diversions were made either for corporate purposes of plaintiff or preferential payments in full to certain warrant holders instead of upon a pro rata basis, as required by law; and that every payment made out of such special assessment funds by Mau was by voucher, signed by the mayor, the comptroller and Mau, in accordance with the city ordinance. Plaintiff further concedes that such

diversions as were made for corporate purposes are not recoverable by plaintiff either from Mau or his surety. It was held by this court (First Division) in People v. Metropolitan Casualty Ins. Co., 339 Ill. App. 514, that such a recovery could not be had.

We agree with plaintiff that if Mau, as treasurer, diverted the special assessment funds for the payment in full to some of the warrant holders to the exclusion of the warrant holders entitled to a pro rata share of such payments, Mau and his surety could be liable for such illegal diversions. Rothschild v. Village of Calumet Park, 350 Ill. 330, and cases there cited.

If the master was correct in excluding the exhibits referred to, relied upon by plaintiff for establishing liability of defendant Mau and his surety, which ruling the chancellor sustained, then there was no evidence save that of the witness Nugent, whose testimony was confined to the exhibits prepared by him or under his direction, to sustain plaintiff's complaint.

It is fundamental that to recover from Mau and his surety there must be competent proof of alleged diversions by Mau to preferred warrant holders. We agree with plaintiff that where it is necessary to prove the state of accounts, which are found in voluminous records, too impractical to produce upon a hearing, that a witness qualified as an expert to make an audit may testify to compilations made from the records of account and give the results found from such examination, provided the original records are made available

to the adversary. People v. Ervin, 375 Ill. 435. However, in the instant case, the compilations contained in the exhibits excluded by the master are predicated upon entries not verified at the original source. Records necessary for such verification are missing, including original vouchers or receipts showing payments and to whom made. As already indicated, they are based in part upon audits made by Wolff & Company, which were not verified or qualified or made available to the adversary, and some of the records examined were illegible due to a water-soaked condition.

In LeRoy State Bank v. Keenan's Bank, 337 Ill. 173, the court said (pp. 191-193):

"While the material contents of an existing book of original entry which is obtainable cannot be proved by parol testimony, because the book is the best evidence, yet where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection, any competent witness who has examined the originals may testify as to such result, provided it is capable of being ascertained by calculation. (Inter-State Finance Corp. v. Commercial Jewelry Co. 280 Ill. 116; People v. Gerold, 265 id. 448.) * * * While the results of the examination of voluminous documents, writings, records and books may be proved by expert accountants or other competent person who has made the examination, the documents, records or books upon which the examination is based must be of such a character as to be themselves admissible in evidence. * * * It was therefore necessary that the books and papers which the expert accountants examined should themselves have been competent evidence. In order to render an account book admissible in evidence it is essential that proof as satisfactory as the transactions are under the circumstances reasonably susceptible of, shall be given that the entries made are correctly recorded. (People v. Small, 319 Ill. 437; Chisholm v. Beaman Machine Co. 160 id. 101; House v. Beak, 141 id. 290.) * * *

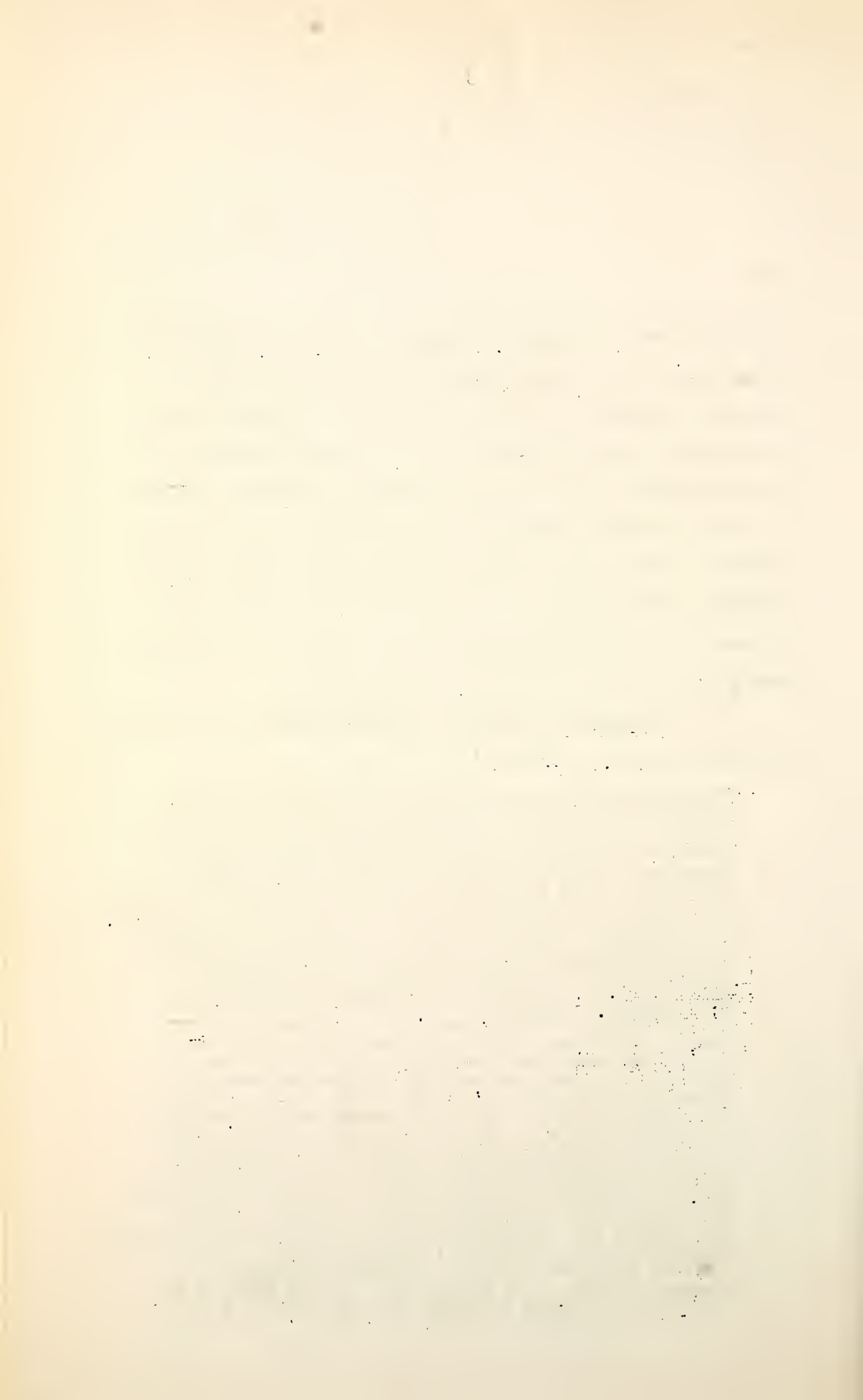


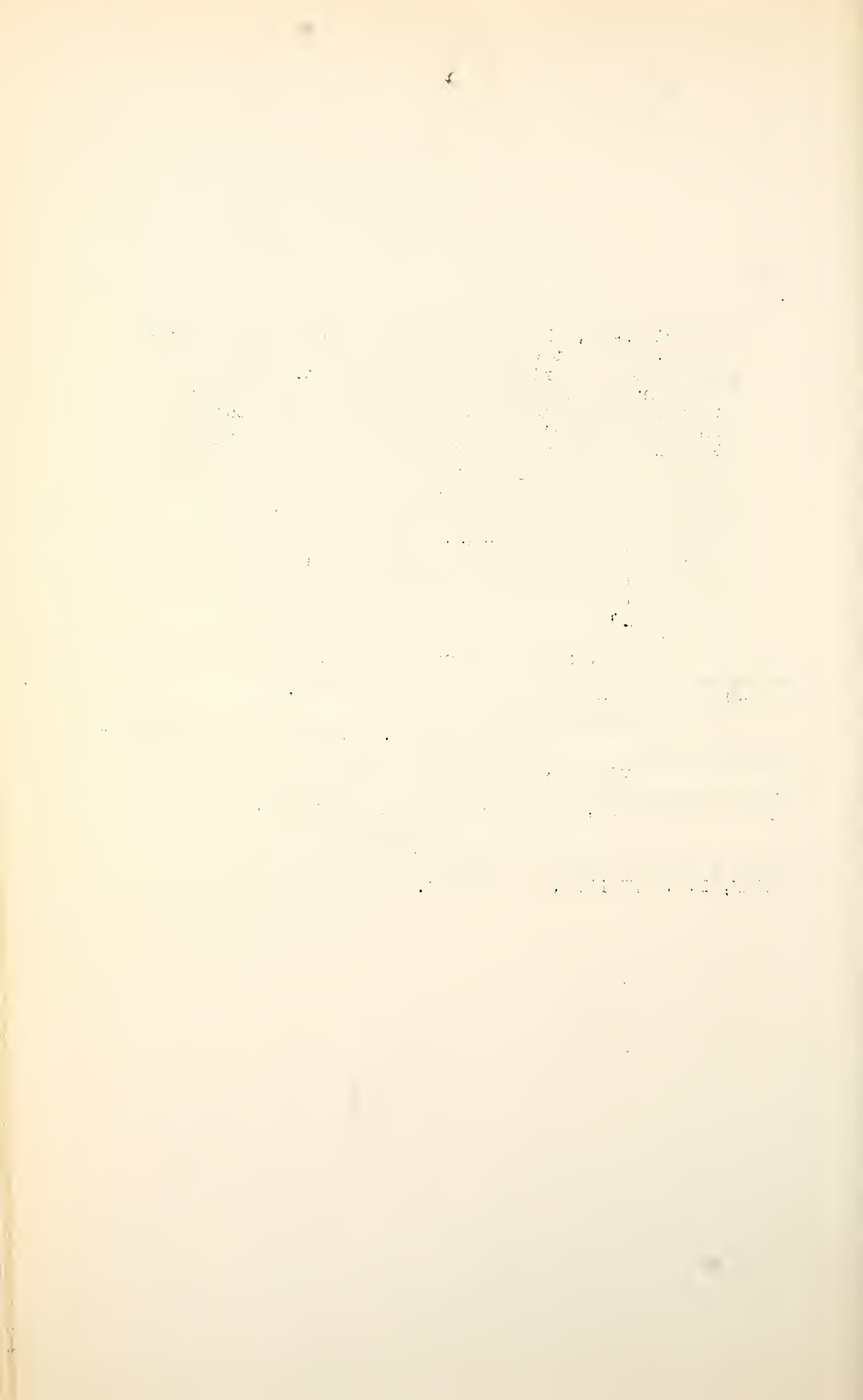
Exhibit A-20, which was used in reaching the results arrived at by the accountants, was in large part not a book of original entry, but was, so far as more than half of the period which it purported to cover was concerned, copied from other books to whose authenticity and correctness no one testified. For these reasons the books were not admitted in evidence. The conclusions of the accountants, however, based on these books, which were not so verified as to make them competent evidence, were received and were made the basis of the judgment which was rendered. * * * Since the books were not shown to be competent evidence the statement of the conclusions reached by a consideration of them was not competent evidence and should not have been admitted."

Upon the record before us we must hold that the master was correct in excluding the exhibits. ✓

The decrees appealed from, dismissing the complaint for want of equity and taxing the costs of the master against plaintiff, are correct and are affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.



62

11

45371

CHARLES SCHROEDER,

Appellant,

v.

JOHN BRENNAN and ZIPPY LABORATORIES,
INC.,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

345 I.A. 87¹

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an amended complaint seeking a mechanic's lien against the property of defendant Brennan, on the ground that certain improvements were made by plaintiff on Brennan's property with his knowledge and consent, and in the alternative for a money decree against defendant Zippy Laboratories, Inc., a tenant of Brennan's, for services performed by plaintiff under the terms of a written contract. The cause was referred to a master. Objections filed by plaintiff to the master's report were ordered to stand as exceptions which were overruled. In conformity with the findings and recommendations contained in the master's report a decree was entered which denied a mechanic's lien and dismissed Zippy Laboratories, Inc. from the suit for want of equity. Plaintiff appealed to the Supreme Court, where the cause was transferred to this court for the reason that no constitutional question is involved. Schroeder v. Brennan, 406 Ill. 415.

Plaintiff's first contention is that a payment made by him on account of master's fees while the cause was

being heard by the master vitiates the entire proceeding.

In his objections to the master's report plaintiff asserted that the master asked for and received the sum of \$150 on account of his fees from each of the parties before the disposition of the objections to his report, in violation of section 3, rule 58 of the Superior Court of Cook County.

The record shows that plaintiff and his son filed affidavits averring that at a master's hearing on February 17, 1948 the master stated that he wanted a payment on account of master's fees before proceeding with the hearings and that he would not proceed unless such payment was made. Harry B. Haskell, president of Zippy Laboratories, Inc., and counsel for defendant also filed affidavits alleging in substance that the parties agreed to divide the master's fees "whatever they may be" equally between them, and advised the master of their agreement regarding the payment of his fees; that the master at no time during the hearing of the cause stated that he wanted a payment on account of fees, nor did he at any time state that he would not proceed with the hearings if his fees were not paid; and that the money paid by plaintiff to the master was a voluntary payment in accordance with the agreement between the parties. The record also shows that the master filed a supplemental report in which he states that no demand or request for any deposit on account of fees was made by him during the hearings; that the deposits were voluntarily made by each of the parties after several hearings were had.

Plaintiff admits that no objection was made by him to the alleged demand of the master for fees, until after the proofs were closed and the master's report was filed. Nor does plaintiff say that the master's fees, fixed by the chancellor, are excessive. Assuming, without deciding the issue of fact raised by the affidavits and the master's supplemental report, that the master did make a request for fees during the course of the hearings, we think this contention is without merit. The plaintiff waived his right to complain by participating in the subsequent hearings after payment and waiting until after the master's report was filed before making any objection. In order to avail himself of this objection he should have raised it at the first reasonable opportunity. (Shoal Creek Coal Co. v. Industrial Com., 300 Ill. 551.)

The master found that plaintiff, an electrical contractor doing business as the Grove Electric Company, entered into a written agreement with the Zippy Laboratories, a corporation, which reads:

"June 6, 1946

Zippy Laboratory
7058 S. Wabash Avenue,
Chicago, Illinois

I Hereby Agree to install power and lighting at the above address on a Time and Material basis. All labor (\$3.30 per hour for each man) Material and permit to be paid extra by Zippy Laboratory.
Deposit of \$200.00 to be paid when work is commenced.

Grove Electric Company
By

Chas. H. Schroeder, Jr.

Accepted by H. B. Haskell."

That plaintiff estimated the total cost of the proposed electrical work at \$450 or \$500; that simultaneously with the execution of the agreement defendant paid plaintiff \$200; that about June 29, 1946 defendant paid plaintiff the additional sum of \$500, which sum according to defendants constituted a final settlement; that two of defendant's motors burned out while the work was in progress; that another motor continued to "run hot"; that it became necessary for the defendant to employ an electrical engineer to change some of the wiring done by plaintiff and to make the motors function properly; that after receiving the sum of \$700 plaintiff claimed there was an additional balance due of \$1,887.09 for material and labor; that the work done by plaintiff was unnecessarily protracted and was not done in a workmanlike manner; that much of it was patently defective and delayed defendant in the operation of his business; that the prices charged by plaintiff for materials furnished to defendant were grossly excessive; that \$700 received by plaintiff from defendant is adequate compensation for the labor and material furnished and that plaintiff is not entitled to any further compensation for labor or materials and is not entitled to a mechanic's lien upon the premises described in the amended complaint.

Plaintiff further contends that there is no evidence that the work was not done in a good workmanlike manner and that the cost of material was grossly excessive.

The rule is well established that a master's conclusions of fact will not be given the weight of a verdict

of a jury, yet they are entitled to credit and when approved by the chancellor they will not be disturbed on review unless manifestly against the weight of the evidence. .

(Fuller v. Cook, 405 Ill. 32; Kane v. Johnson, 397 Ill. 112.)

Zippy Laboratories, Inc. is in the business of processing starch. Plaintiff and three electricians employed by him testified in substance that the electrical work performed at the Zippy Laboratories, Inc. was done in a good workmanlike manner and that on several occasions at defendant's request there were changes made in the wiring and the motors. According to plaintiff's testimony the whole job "took approximately two months to complete"; that the prices charged for the materials used were fair and reasonable, and that \$2,500 is the "usual" charge for the work performed.


Defendant's evidence tends to show that it furnished new motors; that the motors, machinery, and equipment were all in place when the electrical work to be performed by the plaintiff was started; that some of the motors burned out and others ran hot; that as a result of plaintiff's defective workmanship some of the starch being processed was spoiled and rendered worthless. One witness, Anderson, head of an electrical engineering company, testified that one motor was "wired up wrong"; that another was "ready to fall off because it was overheated"; that the wiring was faulty; and that "we changed the whole set-up there."

Ben Kaufman, an electrical contractor for about twenty years, called by the defendant, testified that excessive charges were made by plaintiff for various items of electrical equipment alleged to have been used by him, and that the

-6-

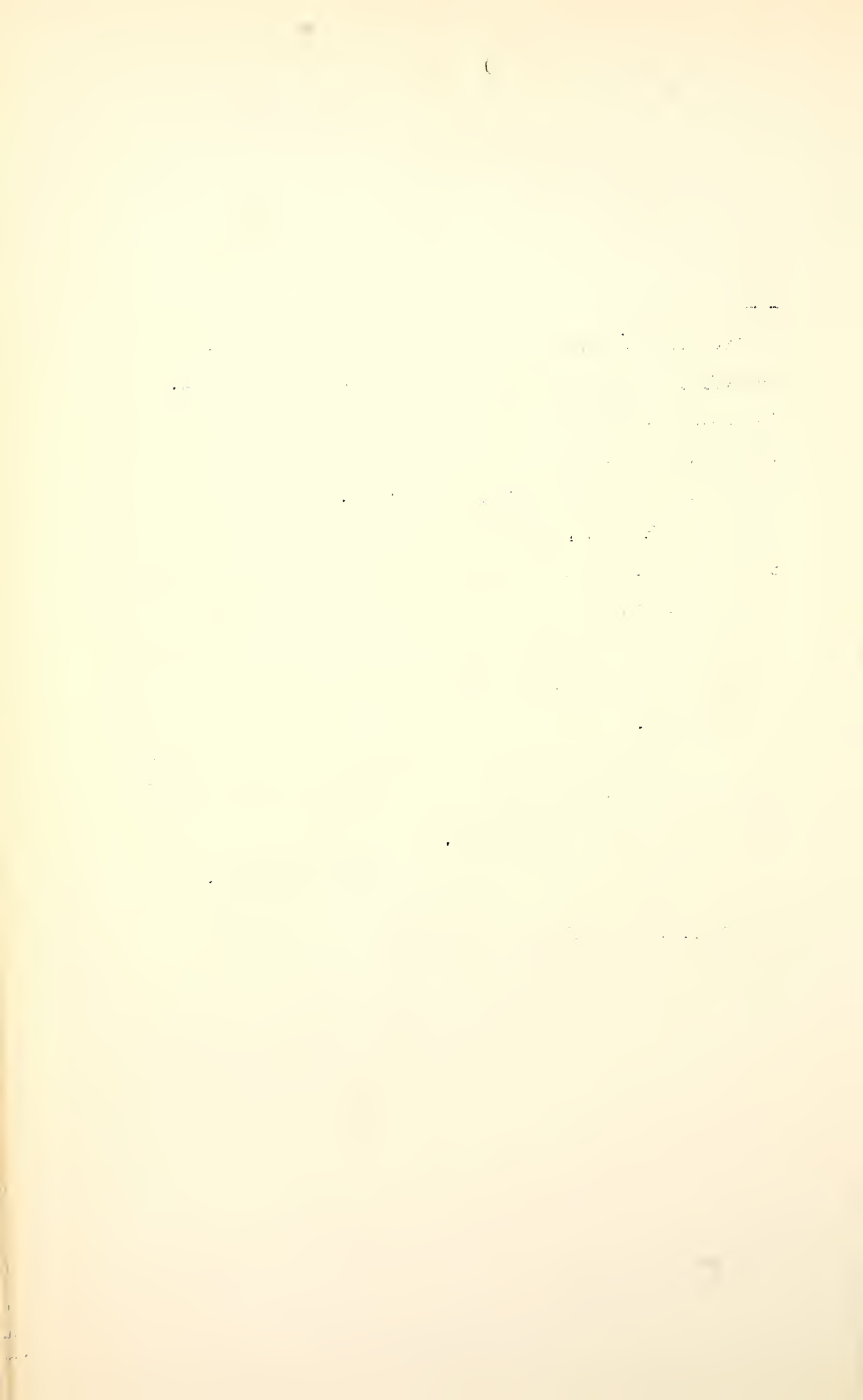
entire work performed by plaintiff was worth between \$700 and \$750, and should have been completed in five days. It is uncontroverted that eight months elapsed from the time the work was commenced by plaintiff until it was approved by an inspector of the City of Chicago.

Haskell, president of the Zippy company, testified that at the time the written agreement was executed between the parties they agreed that the maximum cost of the work to be performed by plaintiff would not exceed \$450. A further recital of the evidence in detail would unnecessarily extend this opinion.

From a reading of the record we think the evidence  amply supports the findings in the decree. For the reasons given, the decree is affirmed.

DECREE AFFIRMED.

KILEY, P.J., AND FEINBERG, J., CONCUR.



63 A

45427

WILLIAM C. GROEBE, FLOREN CIPAR)
and ELLEN L. CIPAR,)
Appellants,)
v.)
ELIZABETH MIERKE,)
Appellee.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

345 I.A. 87²

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiffs seek to reverse a judgment entered on the verdict of a jury in an action on a promissory note given by defendant as part payment for the purchase of certain real estate. Defendant signed a written contract to purchase the premises owned and occupied by plaintiffs Floren Cipar and Ellen Cipar, his wife, for the sum of \$29,000. The contract recited, "earnest money paid—\$2,800," and provided that the remainder of the purchase price of \$26,200, was "to be paid on passing deed." Simultaneously with the execution of the real estate contract defendant also executed a judgment note for \$2,800 payable on demand to William C. Groebe & Company. The note contained a confession clause and concluded with a recital which reads, "This note to apply to, the purchase of home located at 9218 South Longwood Drive, Chicago, Illinois." Groebe had a judgment entered by confession on the note. On motion of defendant an order was entered to open the judgment and leave given defendant to make her defense.

The affidavit of defense alleges in substance that one John Kirchknopf, a salesman employed by William C. Groebe a real estate broker, called at the residence of defendant and informed her that the Cipars' property was for sale; that defendant told Kirchknopf that she would not be interested in buying the Cipar property unless the premises she owned and occupied as a home were also sold, because she had no use for two residences; that Kirchknopf agreed to find a purchaser for defendant's residence; that defendant gave Groebe an exclusive agency to sell her property; that at the time defendant executed the real estate contract and the note in controversy Kirchknopf agreed with defendant that no demand for payment of the note would be made until Groebe had sold defendant's premises; that Groebe failed to inform the Cipars that payment of the promissory note was conditioned upon the sale of defendant's property; and that the real estate purchase contract and note executed by defendant were obtained by fraud.

Afterwards an amended statement of claim was filed joining the Cipars as plaintiffs and alleging that the defendant executed the real estate contract and note in question; that plaintiff performed all the conditions precedent in accordance with the terms of the contract; that plaintiffs declared a forfeiture of the note as liquidated damages according to the contract; that the Cipars agreed to pay Groebe & Company a real estate broker's commission of \$1,500; that the Cipars are liable to William C. Groebe & Company for a real estate broker's commission of \$1,500

and entitled to a judgment against the defendant for the broker's commission and also for the sum of \$1,300, being the balance of the earnest money deposit as evidenced by the note. A copy of the contract and note is attached to the amended statement of claim. Defendant filed an affidavit of defense to the amended statement of claim containing substantially the same allegations made in the original affidavit of defense.

Defendant and her husband testified that they told Kirchknopf before executing the real estate contract and note here involved that the premises which they occupied had to be sold "before they would pay any money on the Cipar deal"; that defendant's husband wanted this provision written into the contract but that Kirchknopf said that he feared such a provision "would queer the deal"; that Kirchknopf told defendant that he would "hold up the deal" until defendant's premises were sold; that no money was paid to Groebe nor did he ask for any.

Kirchknopf denied that the execution of the contract and note by defendant was conditional. He testified that he did not inquire of defendant or her husband whether their property was for sale; that after defendant signed the contract to purchase the Cipar property defendant and her husband stated that if their house was not sold they would rent it.

Groebe admitted that he had a contract for the exclusive right to sell the Mierke home at the time he demanded payment of the note in question but that he had not

~~4~~

found a purchaser that was acceptable because the Mierke contract called for "a cash deal".

Plaintiffs contend that defendant cannot vary the terms of the real estate contract. They argue that assuming that Kirchknopf, the salesman, did make oral statements to defendant, they are not binding upon the Cipars for the reason they were not reduced to writing and ratified by them. We think plaintiffs' contention is without merit. It is undisputed that Kirchknopf was the Cipars' agent.

According to the allegations of the amended statement of claim plaintiffs declared a forfeiture of the note as liquidated damages. No other evidence was introduced by them with respect to damages.

Plaintiff seeks to recover on the promissory note. The law is well established that under section 16 of the Negotiable Instruments Act defendant is permitted to show the conditional execution and delivery of the note by oral testimony. (Paluszewski v. Tomczak, 273 Ill. App. 245; Schmidt v. Schmidt, 253 Ill. App. 514; Straus v. Citizens State Bank, 164 Ill. App. 420.)

The question whether the execution and delivery of the note was conditional presented an issue of fact which the jury resolved in favor of defendant. In the view which we take of this case it is unnecessary to consider the other points raised.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND FEINBERG, J., CONCUR.

45328

RIGNEY CO., a corpo-
ration,

Appellee,

v.

JOHN DILLON & CO., a
corporation, and JOHN
P. DILLON,

Appellants.

68 A 3
345 I.A. 184¹

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

Rigney Co., a corporation (appellee), filed its complaint in the Superior Court of Cook County against John Dillon & Co., a corporation, and John P. Dillon (appellants), alleging that plaintiff and defendants, as coadventurers, had entered into an oral agreement to procure contracts for the performance by them of road construction work; that plaintiff would finance such contracts and defendants would perform the work and furnish certain machinery and equipment, and said parties would share the profits and losses equally. The complaint prayed for an accounting between the parties as to certain specific contracts. The defendants filed their answer and cross complaint in which they also asked for an accounting. The chancellor referred the case to a master in chancery to hear evidence limited to the issue as to the kind and character of contract entered into between the parties and the terms and conditions thereof. The master filed his report and supplemental report in which he made findings and in his conclusion recommended to the court the nature and terms of the

contract between the parties, and further recommended that an accounting should be had between the parties on the basis of those findings.

The chancellor, after a hearing on the exceptions of the plaintiff and defendants to the master's report, entered a decree adopting the report of the master except as to certain items pertaining to overhead and general operating expense, which the chancellor modified. The decree, without adjudging or decreeing the kind and character of the contract entered into between the parties or the terms and conditions thereof, stated merely as follows:

"Said master's reports are hereby approved, confirmed and adopted in each and every particular thereof, as the findings of this court."

The decree then again referred the case to the master to state accounts between the parties thereto. From this decree the defendants prosecuted their appeal.

This decree does not terminate the litigation on the merits of the case but retains the cause for the determination of matters of substantial controversy between the parties. Both plaintiff and defendants pray for the same relief, an accounting. The only points at issue were the nature and terms of the contract between the parties. The master made his findings on these points which, with modification, were adopted as the findings of the court. This is permissible under the Practice Act (ch. 110, sec. 188(3)). The recital of these findings in the decree, however, is not suffi-

✓
104.064

-3-

cient; the decretal part of it must adjudicate the issues. These findings merely correspond to the verdict of the jury. Nothing is decided by the verdict until a judgment is entered on it and so nothing is decided by the recitals in a decree until the questions at issue are adjudicated in the ordering part of the decree. Chechik v. Koletsky, 305 Ill. 518, 519. This decree in no way can be interpreted to be final because it is impossible for the party in whose favor the findings were made to obtain any benefit therefrom. The chancellor must of necessity adjudicate in the decree the issues that were referred to the master. The accounting which is the principal relief prayed for by the parties and not an incident of the suit, has not been had or decided. This must be disposed of by the trial court before a review can be entertained by this court. The People v. Stony Island State Savings Bank, 355 Ill. 401. We are, therefore, of the opinion that the decree is interlocutory and that this court is without jurisdiction to hear this appeal. ✓

Appeal dismissed.

Tuohy, P. J., and Schwartz, J., concur.

45414

69

A

HENRY THOMAS, JESSIE JOHNSON)	
and MARY F. AMOS,)	
Appellants,	)	APPEAL FROM CIRCUIT
)	
v.	)	COURT, COOK COUNTY.
)	
JACK MOSHEIM,)	
Appellee.)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

345 I.A. 184²

Plaintiffs sue for personal injuries and property damage resulting from a collision between a car driven by plaintiff Henry Thomas and the car of defendant at the intersection of Ashland and Washington boulevards, in Chicago, Illinois, at approximately 1:20 A.M. on May 30, 1947. A jury returned a verdict of not guilty. Judgment was entered on that verdict and plaintiffs appealed. The case on behalf of defendant, which the jury believed, is that at the time of the accident he was an interne in Cook County Hospital; that he was driving a 1946 Chevrolet; that he was returning to the hospital after a midnight lunch and was driving south on Ashland; that he was well within his proper lane of traffic; that as he approached Washington boulevard he observed the car driven by plaintiff Thomas going north; that when he was approximately sixty feet away from the intersection, observing that plaintiffs' car was drawing toward the line which divided the north and south lanes of traffic, he flicked his lights to warn plaintiff that he was going straight ahead on Ashland avenue, but plaintiff Thomas without giving any signal, turned left and drove his automobile across the dividing

-2-

line of Ashland avenue directly in the path of defendant's automobile. The testimony of defendant is supported by the testimony of police officers who examined the locale of the accident and testified that skid marks of the colliding automobiles were apparent and that from a study thereof, they corroborate defendant's testimony. Plaintiff Thomas was driving a 1936 Ford and it is his position, supported to some extent by one disinterested witness, that as he brought his car to a standstill at the middle of the intersection, his front wheels just across the center line, defendant swerved to the left of center in order to pass a car in front of him and struck plaintiffs' car. Thus a sharp issue of fact was presented to the jury. There was ample evidence to sustain their verdict.

There is no ground for reversal unless errors occurred in the course of the trial which deprived plaintiffs of a fair trial. Complaint is made of certain instructions couched in the language of the statute relating to the making of a left-hand turn and turning a vehicle from a direct course upon a highway. In this connection defendant points out that the abstract is inadequate to determine this question because only the three instructions complained of were abstracted. Defendant's point is well taken. Instructions have to be considered as a whole and where error is predicated on the giving of instructions, all the instructions should be abstracted,

or it should be made to appear from the record that these were the only instructions on that point. The record should show at whose instance the instructions were given. In this case it is clear that the instructions were tendered by defendant, but it is easily conceivable that even in a case like this, that could become a doubtful question and should not be left to conjecture. It may be fairly said that the cases in which instructions in the language of the statute have been held bad relate to right of way where automobiles approach at right angles, or those which use such phrases as "prima facie" and "proximate cause." As against these cases there are cases which have held that courts could "hardly pronounce to be error the laying down the law in the words of the law itself." Chicago, B. & Q. Ry. Co. v. Haggerty, 67 Ill. 113, 117; Dukeman v. Cleveland, C. C. & St. L. R. Co., 237 Ill. 104, 111; Corelis v. C. B. & Q. R. Co., 244 Ill. App. 47.

The statutes quoted in the instructions contained some language not applicable to the facts. That, however, is not error in and of itself. Rhoden v. Peoria Creamery Co., 278 Ill. App. 452, at 469, 470; Corelis v. C. B. & Q. R. Co., supra. The language in the instructions which is not applicable to the issues in this case would be clear to a child, and we must assume that the jury had some discriminating intelligence.

It is next charged that counsel for defendant made improper and prejudicial statements and asked questions

which were obviously improper. Thus, when plaintiffs' counsel asked defendant on cross-examination, "What automobile got into the intersection first?", defendant's counsel objected, stating "It makes no difference who got there first. We had the right of way to proceed." Defendant's point was based upon the supposition that as plaintiff Thomas was making a left turn, he had to yield the right of way to defendant who was proceeding directly ahead. This position is not entirely correct. It was, however, important in a case of this sort to fix definitely what point of the intersection was referred to. Entering the intersection may mean who first passed over the respective curb lines, building lines, or central intersecting points. We certainly cannot say that either the objection or question was made with obvious intent to prejudice. Moreover, the court finally did permit the witness to answer the question as to whether he crossed the north line before the other automobile crossed the south line. This we think was a question more to the point than counsel's. There was then some discussion concerning defendant's counsel shaking his head at the witness. Defendant's counsel denies that he shook his head; admits that the witness shook his head, but what he was referring to was that it was important for him, a doctor, to get back to the hospital and it was time for counsel to ask for an adjournment, which they had obviously discussed earlier. The trial court saw this and evidently accepted defendant's counsel's statement. Defendant's

counsel is an experienced and, to our knowledge, well-behaved lawyer of good repute. The trial court accepted his word and we see nothing in the record to doubt it. One remark made by counsel in his closing argument we consider to be improper, and that is his reference to a gun-shot wound in plaintiff Johnson's leg, sustained after the accident. However, this certainly does not warrant a reversal.

The next point counsel makes on the alleged misbehavior of defendant's counsel is that he inquired about a safety sticker on Thomas' car. The court sustained an objection to this. Counsel argues that this line of examination was improper and that the questions were asked merely to influence the jury. Without specifically passing upon the point, we doubt the validity of plaintiffs' argument that the question was obviously erroneous. Plaintiff Thomas had testified that his car, a 1936 Ford, had good brakes. "They were tested just about two weeks before." We think this could well have been understood by a jury in the City of Chicago as meaning that he had obtained a safety sticker.

Counsel for plaintiff also complains of the fact that witnesses were examined with respect to liquor being found in and about the car. We note at this point that plaintiffs' counsel examined defendant as to what he had to eat and drink at the restaurant before returning to the hospital. Counsel asked defendant several times what he was "served." The evidence shows that immediately after

-6-

the accident a half-consumed bottle of whiskey was found in plaintiffs' automobile, and that an examination of plaintiff Johnson on his admission to Cook County Hospital showed he was mildly intoxicated. We do not think the evidence in this respect constituted prejudicial error.

As this court has often said and as is well-known by all lawyers and judges familiar with the trial of personal injury cases before a jury, no such trial is free of error.

A motion to dismiss filed by defendant should have been sustained. The report of proceedings was not filed in time nor was a motion to extend filed within the time allotted. However, persuaded by counsel's eloquent description of the hectic and turbulent character of a trial lawyer's life, we have examined the case on its merits, and there is no need to dispose of this motion.

Judgment affirmed.

Tuohy, P.J., and Robson, J., concur.

45422

FRANK LEVINthal,
Appellee,
v.
CHICAGO TRANSIT AUTHORITY,
a municipal corporation,
Appellant.

)
)
) APPEAL FROM CIRCUIT
)
) COURT, COOK COUNTY.

345 I.A. 185¹

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE
COURT.

Plaintiff recovered a judgment for \$5,000 in a
suit for personal injuries and property damages sustained
in a collision between defendant's streetcar and plain-
tiff's truck on June 24, 1947. From this judgment
defendant appeals and assigns as error that the damages
are excessive; that there was error in the admission of
evidence, and with respect to the instructions. The
case must be reversed and the cause remanded on account
of the error with respect to the admission of evidence
and an error in respect to one instruction.

The attending physician, Dr. Marcus, testified
that he had drawn the conclusion that plaintiff was
suffering from a concussion of the brain. On cross-
examination, however, he testified, "* * * it might be
that or it might be something else. In other words, it
was a matter of speculation as to just what caused this
complaint." While of course a physician's diagnosis in
a case such as this is dependent upon inferences which
he may draw from symptoms both subjective and objective,
nevertheless, his conclusion must be something more
mere speculation. This conclusion of the attending

-2-

physician was also taken as one of the hypothetical facts submitted to Dr. Kaplan. It must have been an important element in determining the jury's verdict with respect to the amount of damages. Testimony so speculative in character cannot furnish the basis for the ascertainment of damages by a jury.

The court at the behest of plaintiff instructed the jury on damages in the usual form. This included among other things "loss of earnings, if any, proximately resulting from said injuries." The instruction was good in form, as counsel argues, but there was no evidence to support "loss of earnings." Plaintiff testified that after the accident he was compelled to and did remain away from his place of employment for many days, sometimes going down for an hour or two and then returning home. He stated that his total loss of time was about three or four weeks after the injury; that "the headaches persisted during all that time." It was a proper element of damages, but unfortunately, no showing was made as to the amount of his earnings. When a man has his own business, it is not always easy to prove the amount of earnings. However, the law is lenient in that respect and he may testify to his average earnings over a period of months or years prior to the injury. If he had done so, it would have furnished some basis of ascertainment by the jury as to the loss of earnings.

Plaintiff testified that he received a bill from Dick's Super Service Station for the repair of his car

-3-

and that it cost \$380 to repair it. Defendant contends this does not indicate that payment was confined to repairs made necessary by the accident. We hold that in the absence of any evidence to the contrary, the natural inference from plaintiff's testimony is that he was referring to repairs made necessary by the accident.

Judgment reversed and cause
remanded.

Tuohy, P. J., and Robson, J., concur.

327
2463
Abstract

Gen. No. 10519

Agenda No. 3

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1951

345 I.A. 185

KATHERINE LOUKS,
Plaintiff-Appellant,)
vs.)
BENJAMIN LOUKS,)
Defendant-Appellee.)

Appeal from
City court of Aurora
Kane County

ANDERSON -- J.

Katherine Louks, plaintiff-appellant, filed her complaint for divorce in the City Court of Aurora, Illinois, wherein she charged her husband, Benjamin Louks, defendant-appellee, with having been guilty of extreme and repeated cruelty. Defendant filed his answer denying all of the alleged acts of cruelty. Before trial defendant filed his amended answer wherein he charged plaintiff with having committed adultery with Rudy Walesky. The chancellor on a trial without a jury, after hearing testimony on behalf of the parties, dismissed the plaintiff's suit for want of equity. The plaintiff has appealed.

The defendant does not contend in this court that the charge of adultery was proved, and hence it need not be further considered. The parties lived together as husband and wife for about fifteen years. They had two children, one of whom was killed in an accident shortly before the hearing, and the other, Roger Louks, a boy fifteen years old, testified at the trial.

Roger Louks was called as a witness on behalf of the plaintiff, and on his examination by plaintiff's counsel, Mr. Darling, testified that he



had lived with his mother and father during all the time they were married.

"During that time I had occasion to see how they got along. They got along fine, and some days they quarrelled." He further testified, "My maw would come downstairs the next morning and have bruises on her arm"; that he heard his parents quarrelling on different occasions during the day and night and "on those occasions when I heard them during the night, oftentimes I did see bruises on her the next day." The court then proceeded to cross examine Roger and asked him: "Q. Would you rather not testify here? A. Yes, sir. (Mr. Darling): I would rather not use him, but the situation has reached a point where I ought to. (The Court): How old are you, son? A. Fifteen. Q. You would rather not testify? A. Yes. Q. You love your mother and father? A. Yes." When Mr. Darling resumed his direct examination of the witness, he answered: "I would rather not testify."

Then followed the following colloquy: "Court: Ask your client if she insists that the boy testify. Mr. Darling: I am reluctant to use him. Court: I am going to make a record of it. Here's a boy of tender years, loves his father and mother, and I don't think a divorce court would make a boy testify if he did not want to. Mr. Darling: All he's asked to do is tell the truth. Court: We're going to stop some place

Mr. Darling: Any witness can get on the stand and say he would rather not testify. Court: We're not talking about any witness; we're talking about a boy fifteen years old, looking at his father and mother, and no Appellate Court in the world would make him testify. I'm willing to make some law in the future. This is bitter." Then appears another colloquy between the court and Mr. Darling, the substance of which was that the court would not permit Roger to testify, and Mr. Darling objected. Plaintiff rested her case, and Mr. Darling was asked by the court if he wanted to

make an offer of proof, and he replied, "No, let it stay out." Mr. Murphy, attorney for the defendant, then made an oral motion to dismiss the plaintiff's case. The court then said: "No. I am going to hear the whole thing. Let the record show that this boy, fifteen years old, a son of the plaintiff and the defendant, now living with the plaintiff, requested upon advice of the court that he be not required to testify, and the court granted his request." Mr. Darling said: "Objection by the plaintiff." Mr. Murphy said: "Do I have a ruling in regard to my motion for directed verdict?" The court replied: "Motion dismissed and denied." the witness was then excused.

The appellant assigns as error the ruling of the court in not permitting Roger Louks to testify. There is no question but that Roger Louks, a boy fifteen years old, was a competent witness. (Shannon vs. Swanson, 203 Ill. 52; Epstein vs. Berkowsky, 64 Ill. App. 498; Draper vs. Draper, 68 Ill. 17.) The above cases announce the rule of law that a child over the age of fourteen years is a competent witness to testify in any judicial proceedings. If under fourteen years of age, a child may or may not be a competent witness, depending on his intelligence, maturity, and understanding of the nature of an oath. If permitted to testify under the sound discretion of the court, then the testimony is competent and the court or jury may give it such credence as they think it is entitled to, considering the age, intelligence, and understanding of the witness. It will be noted that defendant's counsel made no objection, but the objection was suggested to the witness by the court. It often happens in law suits that a witness may be reluctant to testify if matters are embarrassing, or if the witness is closely related to the parties; but in order that justice may prevail, it is necessary that testimony of such witnesses

be given. Here it can be seen that the court felt sorry for Roger who was offered as a witness on behalf of his mother, because he would be required to testify either for or against her; but this is not a sufficient excuse. Plaintiff in this case was entitled to have all competent evidence introduced on her behalf to sustain the charges of extreme and repeated cruelty as alleged in her complaint. It might be that the only way that she could have proved these charges was by the testimony of her son. He lived with his parents and was in a position to know more about the conduct of his father towards his mother than almost any other person. While this court appreciates that some times shocking, revolting, and indecent as it may be to compel a witness to testify, nevertheless the court cannot make himself the arbiter of this, where the party is entitled to have the testimony under the rules of law. Appellee urges that, assuming that Roger was a competent witness and the court in his discretion had no right to permit him not to testify, that the appellant waived this by making no offer of proof as to what Roger would testify to if so permitted by the court. It is a well established rule of law in order to assign error on a ruling as to the competency of evidence, that an offer of proof as to such evidence must be made at the time of the trial. (Chicago City Railway Co. vs. Carroll, 206 Ill. 318; Goodrich vs. City of Chicago, 218 Ill. 18.) This rule, however, has its exceptions. It appears from the record that the court was not going to permit Roger to testify whatever the offer of proof was, and to require it would appear to us wholly useless. In Creighton vs. Elgin, 387 Ill. 592, the question arose whether a certain conversation by the witness with one of the parties to the lawsuit was competent. It appeared that the testimony was wholly competent. A general objection which was sustained was made to the testimony. The court says on page 606 of the opinion: "The witness was not a party to the Suit, nor was he interested in that issue, or in the result of the Suit. Any conversations

with, or admissions made by, Lucretia Creighton in her lifetime, against her interest, concerning the ownership of the notes, were relevant and competent. The court clearly erred in sustaining the objection. It is immaterial that the ruling was not followed by an offer of proof. It is not necessary that an offer of proof be made where the question shows the purpose and materiality of the evidence. It is not necessary that counsel state what the answer would be. If a question is in proper form and clearly admits of an answer relative to the issues, the party by whom the question is propounded is not bound to state facts proposed to be proved by the answer unless the court requires him to do so. *Hartnett vs. Boston Store of Chicago*, 265 Ill. 331.9 The prior testimony of Roger shows the purpose and materiality of his testimony, and where there was an objection to the court's ruling as shown by this record, no offer of proof was required. (Creighton vs. Elgin, supra.)

Roger Louks should have been permitted to testify, and the court's ruling permitting him not to testify is reversible error.

Clark E. Martin father of the plaintiff was called as a witness on behalf of the plaintiff. He testified that the first part of May he saw bruises on his daughter's legs and arms, and at a later time saw bruises on his daughter, caused by tooth marks, but did not know that the tooth marks were caused by the defendant; also that he had seen bruises on her at other times. On his direct examination by Mr. Darling, he was asked: "Q. Calling your attention to some time during the month of May, 1950, did you see Mrs. Louks on occasions when she had bruises upon her? A. I did. Q. Where was that? A. On her arm and leg. Q. Where did you see her? A. She was out to my place. Q. Did she tell you how she got them? (Mr. Murphy: Objection. The court: What is the question? Mr. Murphy: He's asking her what caused her bruises. The Court: Sustained." The

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the

the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the

above testimony is not abstracted, but is found in the report of trial proceedings. No offer of proof was made by Mr. Darling to show that the witness would have testified that plaintiff told him that the bruises or teeth marks were caused by her husband. This testimony was offered to corroborate the testimony of the plaintiff that she had been assaulted and bruised by her husband on various occasions as related by her testimony. The plaintiff assigns as error the ruling of the court that the witness was not permitted to testify how the plaintiff claimed she received the bruises. The Supreme Court in an early case of *Berdell vs. Berdell*, 80 Ill. 604, discusses the question whether a wife in a divorce suit who has received bruises by acts of violence of her husband can corroborate that the husband committed the acts by testimony of other persons who have seen the bruises, and who state that the wife told the witnesses that her husband caused them. In *Berdell vs. Berdell*, supra, the court says on page 606 of the opinion: "The complainant, in her evidence, testifies to numerous acts of personal violence on the part of her husband, which were unjustifiable and without cause or provocation, and if her evidence be true, there can be no doubt that a clear case for divorce was established. But independent of her evidence, on several occasions the marks of violence were discovered on her person by her neighbors, after she claimed to have received blows from her husband. While this character of evidence is not as satisfactory as if witnesses had been produced who saw the blows given, yet the bruises and marks observed and sworn to were competent testimony in confirmation of the evidence given by the complainant."

This court followed the above rule of law in *Muir vs. Muir*, 310 Ill. App. 443, and on page 446 says: "It is first insisted that the court erred in granting the plaintiff her divorce without any corroboration of the acts of cruelty of which she testified. The appellant contends that

the witness, Hilma Kinney's testimony is incompetent. A reading of Hilma Kinney's testimony discloses that she testified that on two occasions Mrs. Muir came to her house and exhibited bruises and marks that Mrs. Muir told her had been inflicted by the defendant, Elmer F. Muir." The court then quotes the language above quoted from *Berdell vs. Berdell*, supra. The court then states on page 446 of the Muir opinion, supra: "Since the decision of the court in this case, this practice has been followed in divorce cases where the charge is cruelty, and we find no case where this practice has ever been overruled or criticized by a court of review." Appellee urges that this rule has been abrogated in *Ryan vs. Ryan*, 321 Ill. App. 467 (1st Dist.), where the court held that the trial court did not abuse its discretion by excluding such type of testimony. The rule permitting this has been assailed on the theory that it permits the party receiving the bruises or other injuries to create evidence by self-serving declarations. This could be true in some instances. The rule announced by our Supreme Court and this court calling it a rule of necessity or a rule contrary to the general rules of evidence to permit a party to make use of evidence which is self-serving, is well established in this State by both the Supreme Court and this court, and it should be followed here. The witness Clark E. Martin should have been permitted to answer the question if he knew how the plaintiff obtained the bruises, and the court was in error in refusing to let him so testify. Nevertheless we are inclined to believe that plaintiff's counsel making no offer of proof to prove what he expected the witness to testify to with reference to this question, cured this error, and cannot be taken advantage of here. (*Grosh vs. Acom*, 325 Ill. 474; *Stewart vs. Kirk*, 69 Ill. 509.)

Appellant urges and assigns as error that the trial court should have granted appellant's motion to disqualify the court and to assign another judge to hear the action on its merits. To answer this question requires a review of the trial judge's comments and rulings while trying the suit. The record discloses that shortly after the plaintiff was placed upon the stand to testify on her own behalf, in which she testified to various acts of cruelty which she said her husband had committed against her, she was cross examined by the court as to the various acts of cruelty and what their domestic troubles were about. Then after a further short examination by her counsel, she was cross examined by Mr. Murphy, attorney for the defendant, concerning the acts of cruelty. He also asked her concerning her relations with Mr. Rudolph Walesky. It appeared from the testimony that Walesky was her business manager, that he did bring her to and from work at various times, but there is no evidence whatever showing any improper relations between them. The court then cross examined her further and fully with reference to her business relations with Mr. Walesky and as to where she was employed. The court interrogated her further as to what time of morning she got home from work. She testified further to various acts of cruelty committed by her husband that would by themselves if corroborated have entitled her to a divorce on the ground of extreme and repeated cruelty.

Rudolph Walesky was called as a witness on behalf of the plaintiff, and was examined by her attorney with reference to the assault committed by the defendant on the plaintiff on October 21, 1950. After a cursory cross examination the court fully cross examined him. This inquiry was largely concerned with the social and business relations between Walesky and the plaintiff. It appears from the examination that the court was attempting to establish that there was something wrong in the relations between the plaintiff and Walesky which would establish the charge of

adultery against her. This was not established either by the attorneys' or the court's inquiries. The court did not cross examine the defendant when he was offered as a witness and fully testified as to the facts at issue in the cause. The court at the close of the testimony asked the defendant if he and his wife could not live together, and he said she just would not, that he had made several efforts to go back. The court also asked the plaintiff in the court room if they could not go back together, and she said, "We tried it before, your honor, and it won't work. My life is in constant danger all the while I live with him." The court then, after all the evidence was in, said, "I don't believe either one of you. I'm going to be candid with you. I have observed the mannerisms and deportment of all these witnesses, and I don't believe any of them. I am going to dismiss the complaint for want of equity." The court, prior to the time the plaintiff had rested her case, and while a colloquy was being had between the court and counsel Darling as to whether or not Roger Louks should be permitted to testify, said: "The way I look at it neither one of them amounts to much."

On the last day of the trial plaintiff's attorney moved that the court disqualify himself to further proceed with the hearing, and to assign another judge for the hearing upon the merits, for the reason that the court in his personal examination of the plaintiff and her witnesses and involuntary refusal to allow plaintiff's witness, Roger Louks, to testify, has shown an attitude toward the plaintiff and her cause of action that is hostile, prejudicial, biased, arbitrary, and not warranted by the evidence before the court or supported by authority of law. This motion was denied. It has been said by our Supreme and Appellate courts on many occasions that the public has an interest in divorce proceedings, and that the cause is never

concluded against the judge, and the court may, to satisfy its conscience -- and it sometimes does -- go into an investigation of facts not disclosed by the pleadings. To be sure that the action is not collusive and the public good will be served by preventing dishonest divorces, it is the duty of the court to grant the divorce if the evidence justifies it, and to deny it otherwise. (Johnson vs. Johnson, 381 Ill. 362.) The State has an interest for the good of its general welfare in the sacredness of the home, both on behalf of the parties and on behalf of the innocent children who may be affected thereby. (Johnson vs. Lihman, 330 Ill. App. 593; Nesheim vs. Nesheim, 293 Ill. App. 257; Ollman vs. Ollman, 396 Ill. 176.)

Counsel for the parties concede the above rules of law to be correct, but appellant contends that the court went outside of this duty and by his cross examination of the witnesses, by his refusal to let Roger Louks testify, and by his remarks made during the trial showed that he was prejudiced. We are somewhat inclined to agree with appellant. It appears that the judge became more of an advocate than an arbiter in this case. His remark prior to hearing all the testimony, that the people did not amount to much, is some indication that he had made up his mind prior to hearing all the testimony that the divorce decree would be refused. Holmstedt vs. Holmstedt, 383 Ill. 290, involved a separate maintenance suit. The lower court dismissed the complaint for want of equity, finding that the action was not brought in good faith. The Supreme Court reversed the lower court, and says on page 297 of the opinion: "It clearly demonstrates the court's feelings against the law authorizing actions for separate maintenance." This holding of the Supreme Court as well as the Judge's actions during the trial of the instant case -- his refusal to permit some of the witnesses who were wholly competent to testify and his comments and

cross examination -- constrain us to hold, as much as we hesitate to do so, that the plaintiff did not obtain a fair, impartial, and unbiased hearing as she should have had, and as she was entitled to under the law. No one doubts the court's power on his own motion to examine and to cross examine witnesses in a divorce action. It appears to us it would have been a more orderly administration of the trial if the court had let counsel complete their examination and then the court examine the witnesses. It is praiseworthy of the judge, and it is his duty in divorce actions, to attempt to get the truth, so that society may be protected from unwarranted divorces; but on the other hand it is his duty to carry on this function so that it cannot be said he was prejudiced or biased against either of the parties to the litigation. The public welfare and protection of the marriage relation and the interest of the child of the parties did not require the chancellor to conduct the trial in the manner in which he did. The plaintiff as well as the State is entitled to a fair and impartial hearing.

Considering this question along with the other matters heretofore mentioned, it is our belief that the judge should have disqualified himself and called in another judge to hear the cause; that his failing to do this in view of the other errors in the record requires a reversal of this cause. Appellant urges that under the evidence she is entitled to a decree of divorce on the ground of extreme and repeated cruelty. Considering the fact that the trial judge has stated that he did not believe the witnesses, and that he is in a better position to pass upon the credibility of the testimony than we are, we think this should be denied. In *Hitchcock vs. Hitchcock*, 373 Ill. 352, the Supreme Court says: (page 356) "Appellant's counsel contends that the evidence does not support the decree for divorce. The witnesses were heard and seen by the chancellor, he thus having an advantage this court does not possess, to study their demeanor and fairness or lack of it. It was his duty to determine the credibility of the witnesses

and his finding in that regard will not be disturbed if the record justifies the decree, as it does in this case. Floberg vs. Floberg, 353 Ill. 626; Reinken vs. Reinken, 355 id. 539." In view of this well established principle of law we do not feel that the testimony in the record would justify us in directing the trial court to enter a decree of divorce in appellant's favor. (Podgornik vs. Podgornik, 392 Ill. 124.)

Considering the errors in this record, it is our belief that the plaintiff is entitled to a new trial. It is also our opinion in view of the motion made by plaintiff and considering the entire record, that it will be for the best interests of all concerned that the chancellor who heard this case not hear it again. Where a litigant objects to a judge trying a cause and such objection is not frivolous and made in apt time, it is better for the proper administration of public justice and for the public good, regardless of the fact that the court knows the reasons assigned are groundless, that some other judge try the cause.

It is therefore ordered that the cause be reversed and remanded with directions, directing that the cause be assigned to some other judge to be called in by the presiding judge of the said court to try the cause.

Decree reversed, cause remanded with directions,

2403

Agenda No. 11

Appeal from Circuit
Court of McLean
County

3451A.293

Lloyd Eyer, plaintiff-appellant, brought suit against W. B. Read and Howard Read doing business as W. B. Read & Co., defendants-appellees, to recover money Eyer claimed was owing him for services rendered W. B. Read & Co. over a 26 year period. Originally a suit in equity for an accounting, the cause was transferred to the law docket, an amended complaint was filed, and upon issue being joined the matter was referred for the hearing of testimony to a Special Commissioner appointed by the court. The Special Commissioner found in favor of plaintiff-appellant, and both parties, hereinafter referred to as plaintiff and defendant, filed objections to his report. The trial court found that the Special Commissioner's report was in error, set it aside, ordered Eyer's complaint dismissed and awarded costs to the defendants. It is from that judgment that this appeal is taken.

Abstract

STATE OF ILLINOIS
JUDICIAL DEPARTMENT
Circuit Court

October Term, A.D. 1941

Agenda No. 11

General No. 978

ALLOYE WYER,

Plaintiff-appellant,

vs.

W. B. REED and HOWARD REED, doing
business as W. B. Reed & Co.,
Defendants-appellees.

Appeal from Circuit
Court of Cook
County

3451A.233

Concord, 7.1.

Lloyd Wyer, plaintiff-appellant, brought suit against W. B. Reed and Howard Reed doing business as W. B. Reed & Co., defendants-appellees, to recover money then claimed was owed him for services rendered W. B. Reed & Co. over a 26 year period. Originally a suit in equity for an accounting, the cause was transferred to the law docket, an amended complaint was filed, and Lloyd Wyer being joined the matter was referred for the hearing of testimony to a Special Commissioner appointed by the court. The Special Commissioner found in favor of plaintiff-appellant, and both parties, hereafter referred to as plaintiff and defendant, filed objections to his report. The trial court found that the Special Commissioner's report was in error, set it aside, ordered Lloyd's complaint dismissed and awarded costs to the defendants. It is from that judgment that this appeal is taken.

The defendant moved to strike the abstract of record, claiming that it violated Rule 8 and Rule 10 of the Rules of Practice of this court which provide, in part, as follows:

"8. . . . Where the record contains the evidence, it shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance"

"10. . . . Abstracts and briefs shall be printed ~~upon~~ both sides of the paper in a neat and workmanlike manner, in small pica type"

The objection made to the abstract is that large portions of the testimony favorable to plaintiff are printed in bold black pica type, whereas testimony colorless or unfavorable to him is printed in ordinary pica type, with the obvious purpose of seeking to focus the attention of this court accordingly.

The purpose of an abstract is to present fairly and intelligently to the court the substance of those portions of the record upon which error is assigned. People ex rel Rosenberg v. Angerer, 23 Ill. App. 450. Certainly the abstract is not a proper place to indulge in argument, Trinity Methodist Episcopal Church of Chicago v. Marie Methodist Episcopal Church of Chicago, 199 Ill. App. 580. If the abstract is so unfair and defective that it cannot be supplemented by a further abstract, as where the appellant printed his own testimony only and omitted much of appellee's evidence, the judgment will be affirmed, Knight v. Collings, 127 Ill. App. 333. It is noteworthy that while defendants complain of the inadequacy of the abstract, as well as of its lack of fairness, they have filed no additional abstract, as was their right under Rule 8 of this court. Rule 8 provides further:

"The abstract must be sufficient to present fully every error relied upon, and it will be taken to be accurate and sufficient unless

The defendant moved to strike the abstract of record, claiming that it violated Rule 8 and Rule 10 of the rules of practice of this court which provide, in part, as follows:

"8. . . . Where the record contains the evidence, it shall be condensed in narrative form in the abstract so as to present clearly and concisely the substance"

"10. . . . Abstracts and briefs shall be printed upon both sides of the paper in a neat and workmanlike manner in small clear type"

The objection was to the abstract is that large portions of the testimony favorable to plaintiff are printed in bold black type, whereas testimony adverse to defendant is printed in ordinary clear type, with the obvious purpose of seeking to focus the attention of this court accordingly.

The purpose of an abstract is to present fairly and intelligently to the court the substance of those portions of the record upon which error is assigned. *People ex rel. Rosenberg v. United States, 25 Ill. App. 430.* Certainly the abstract is not a proper place to indulge in argument. *Ex parte National Industrial Union of Miners v. United States, 137 Ill. App. 339.* If the abstract is so unfair and defective that it cannot be supplemented by a further abstract, as where the appellant related his own testimony only and omitted that of appellee's evidence, the judgment will be affirmed. *People v. Collins, 137 Ill. App. 339.* It is noteworthy that while the state complains of the inadequacy of the abstract, as well as of the lack of fairness, they have filed no additional abstract, as was their right under Rule 8 of this court. Rule 8 provides further:

"The abstract must be sufficient to present fairly every error relied upon, and it will be taken to be accurate and sufficient . . . unless

the opposite party shall file a further abstract, making necessary corrections or additions. . . . "

Although the rule of this court should be strictly complied with we cannot agree with the defendants that the abstract is so manifestly unfair that it should be stricken.

The trial court appointed a Special Commissioner or Special Master to take testimony and report his conclusion of law and fact thereon, the action being one at law and matters of account being in controversy. Ch. 110, Sec. 185, Ill. Rev. Stats. 1949, Civil Practice Act, Par. 61.

The Commissioner held in favor of plaintiff. The trial court set aside the Commissioner's report and dismissed the complaint. By analogy to the cases in equity, where a Master (in this case termed a Special Commissioner) is appointed in a law case by the court to hear evidence and report his conclusions of law and fact under the above statute, the trial court has discretion in approving or disapproving the Master's report. Such discretion, however, must not be exercised arbitrarily, and must be effected in accordance with established principles of law. Anthony v. Gilbrath, 396 Ill. 125. It is the duty of the Court, where exceptions are filed, to approve or disapprove the Master's conclusions as they appear to be in accordance with or against the weight of the evidence. Ennesser v. Hudek, 169 Ill. 494.

The case at bar was decided by the trial court upon the Special Commissioner's report after the latter had taken the evidence. The trial court did not hear the testimony of the witnesses in open court and thus

the opposite party shall file a further statement, making necessary corrections or additions. . . .

Although the rule of this court should be strictly complied with we cannot agree with the statement that the object is to make the trial court a party to the evidence.

The trial court appointed a Special Commissioner or Special Master to take testimony and report his conclusion of law and fact thereon, the action being one at law and equity or mixed being a controversy. Cf. 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The case at bar was decided by the trial court upon the Special Commissioner's report after the latter had taken the evidence. The trial court did not hear the testimony of the witnesses in open court and thus

did not have an opportunity to see and hear the witnesses. In such a case the Special Commissioner's findings are entitled to great weight. City of East Peoria v. Colianni & Dire Co., 334 Ill. App. 108, and again by analogy to equity cases, the rule that the finding of the trial court in such a suit at law will not be disturbed on appeal unless it is clearly and manifestly against the weight of the evidence does not obtain, Oliver v. Ross, 289 Ill. 624; Steinke v. Sztanka, 364 Ill. 334; Brubaker v. Hatfimanolis, 338 Ill. App. 288; Anderson Bros. Mfg. Co. v. Larson, 326 Ill. App. 82. The Appellate Court is not limited to that inquiry but may determine whether the trial court's decision was proper under the law and the evidence. Barton v. Montrose Ave. Hoapital & Sanitarium, 333 Ill. App. 309.

The evidence discloses that W. B. Read had operated a toy and school supply store in Bloomington, Illinois for 53 years. Howard Read joined him as partner some time ago. A sporting goods department was added to the business and was located in an adjoining building. Lloyd Eyer was hired by W. B. Read as an employee of that department in 1918, and since 1922 managed that department, performing the usual duties of a manager and also appearing in behalf of the firm at sporting events and civic functions.

Both parties agree that in 1918 Eyer began to work for Read, at an annual salary of \$1800.00, the first year on a trial basis to determine whether the arrangement would prove mutually satisfactory. It did, and the employment continued.

Read testified to subsequent salary changes, in 1923 to \$2400.00, in 1929 to \$2850.00, in 1930 to \$3000.00, in 1933 to \$2795.00 and in 1934 to \$2727.00. This salary schedule is apparently not in dispute.

did not have an opportunity to see and hear the witnesses. In such a case the Special Government's findings are entitled to great weight. *City of East Texas v. Collins*, 334 Ill. App. 1st, 103, and again by analogy to equity cases, the rule that the finding of the trial court in such a suit as law will not be disturbed on appeal unless it is clearly and manifestly against the weight of the evidence does not obtain. *Quinn v. Quinn*, 339 Ill. 621; *Quinn v. Quinn*, 336 Ill. 334; *Quinn v. Quinn*, 333 Ill. 333. The Appellate Court is not limited to that finding but may determine whether the trial court's decision was proper under the law and the evidence. *Quinn v. Quinn*, 333 Ill. 333.

The evidence discloses that W. B. Head had operated a toy and school supply store in Macomb, Illinois for 23 years. Howard Head joined his as partner some time ago. A sporting goods department was added to the business and was located in an adjoining building. Lloyd Head was hired by W. B. Head as an employee of that department in 1915, and since 1922 managed that department, performing the usual duties of a manager and also appearing in behalf of the firm at sporting events and other transactions.

Both parties agree that in 1915 Head began to work for Head, at an annual salary of \$1,000.00, the first year on a trial basis to determine whether the arrangement would prove mutually satisfactory. It did, and the employment continued. Head was entitled to subsequent salary increases, in 1917 to \$1,500.00, in 1919 to \$2,000.00, in 1921 to \$2,500.00, in 1923 to \$3,000.00, in 1925 to \$3,500.00, in 1927 to \$4,000.00, in 1929 to \$4,500.00, in 1931 to \$5,000.00, in 1933 to \$5,500.00, in 1935 to \$6,000.00, in 1937 to \$6,500.00, in 1939 to \$7,000.00, in 1941 to \$7,500.00, in 1943 to \$8,000.00, in 1945 to \$8,500.00, in 1947 to \$9,000.00, in 1949 to \$9,500.00, in 1951 to \$10,000.00, in 1953 to \$10,500.00, in 1955 to \$11,000.00, in 1957 to \$11,500.00, in 1959 to \$12,000.00, in 1961 to \$12,500.00, in 1963 to \$13,000.00, in 1965 to \$13,500.00, in 1967 to \$14,000.00, in 1969 to \$14,500.00, in 1971 to \$15,000.00, in 1973 to \$15,500.00, in 1975 to \$16,000.00, in 1977 to \$16,500.00, in 1979 to \$17,000.00, in 1981 to \$17,500.00, in 1983 to \$18,000.00, in 1985 to \$18,500.00, in 1987 to \$19,000.00, in 1989 to \$19,500.00, in 1991 to \$20,000.00, in 1993 to \$20,500.00, in 1995 to \$21,000.00, in 1997 to \$21,500.00, in 1999 to \$22,000.00, in 2001 to \$22,500.00, in 2003 to \$23,000.00, in 2005 to \$23,500.00, in 2007 to \$24,000.00, in 2009 to \$24,500.00, in 2011 to \$25,000.00, in 2013 to \$25,500.00, in 2015 to \$26,000.00, in 2017 to \$26,500.00, in 2019 to \$27,000.00, in 2021 to \$27,500.00, in 2023 to \$28,000.00, in 2025 to \$28,500.00, in 2027 to \$29,000.00, in 2029 to \$29,500.00, in 2031 to \$30,000.00, in 2033 to \$30,500.00, in 2035 to \$31,000.00, in 2037 to \$31,500.00, in 2039 to \$32,000.00, in 2041 to \$32,500.00, in 2043 to \$33,000.00, in 2045 to \$33,500.00, in 2047 to \$34,000.00, in 2049 to \$34,500.00, in 2051 to \$35,000.00, in 2053 to \$35,500.00, in 2055 to \$36,000.00, in 2057 to \$36,500.00, in 2059 to \$37,000.00, in 2061 to \$37,500.00, in 2063 to \$38,000.00, in 2065 to \$38,500.00, in 2067 to \$39,000.00, in 2069 to \$39,500.00, in 2071 to \$40,000.00, in 2073 to \$40,500.00, in 2075 to \$41,000.00, in 2077 to \$41,500.00, in 2079 to \$42,000.00, in 2081 to \$42,500.00, in 2083 to \$43,000.00, in 2085 to \$43,500.00, in 2087 to \$44,000.00, in 2089 to \$44,500.00, in 2091 to \$45,000.00, in 2093 to \$45,500.00, in 2095 to \$46,000.00, in 2097 to \$46,500.00, in 2099 to \$47,000.00, in 2101 to \$47,500.00, in 2103 to \$48,000.00, in 2105 to \$48,500.00, in 2107 to \$49,000.00, in 2109 to \$49,500.00, in 2111 to \$50,000.00, in 2113 to \$50,500.00, in 2115 to \$51,000.00, in 2117 to \$51,500.00, in 2119 to \$52,000.00, in 2121 to \$52,500.00, in 2123 to \$53,000.00, in 2125 to \$53,500.00, in 2127 to \$54,000.00, in 2129 to \$54,500.00, in 2131 to \$55,000.00, in 2133 to \$55,500.00, in 2135 to \$56,000.00, in 2137 to \$56,500.00, in 2139 to \$57,000.00, in 2141 to \$57,500.00, in 2143 to \$58,000.00, in 2145 to \$58,500.00, in 2147 to \$59,000.00, in 2149 to \$59,500.00, in 2151 to \$60,000.00, in 2153 to \$60,500.00, in 2155 to \$61,000.00, in 2157 to \$61,500.00, in 2159 to \$62,000.00, in 2161 to \$62,500.00, in 2163 to \$63,000.00, in 2165 to \$63,500.00, in 2167 to \$64,000.00, in 2169 to \$64,500.00, in 2171 to \$65,000.00, in 2173 to \$65,500.00, in 2175 to \$66,000.00, in 2177 to \$66,500.00, in 2179 to \$67,000.00, in 2181 to \$67,500.00, in 2183 to \$68,000.00, in 2185 to \$68,500.00, in 2187 to \$69,000.00, in 2189 to \$69,500.00, in 2191 to \$70,000.00, in 2193 to \$70,500.00, in 2195 to \$71,000.00, in 2197 to \$71,500.00, in 2199 to \$72,000.00, in 2201 to \$72,500.00, in 2203 to \$73,000.00, in 2205 to \$73,500.00, in 2207 to \$74,000.00, in 2209 to \$74,500.00, in 2211 to \$75,000.00, in 2213 to \$75,500.00, in 2215 to \$76,000.00, in 2217 to \$76,500.00, in 2219 to \$77,000.00, in 2221 to \$77,500.00, in 2223 to \$78,000.00, in 2225 to \$78,500.00, in 2227 to \$79,000.00, in 2229 to \$79,500.00, in 2231 to \$80,000.00, in 2233 to \$80,500.00, in 2235 to \$81,000.00, in 2237 to \$81,500.00, in 2239 to \$82,000.00, in 2241 to \$82,500.00, in 2243 to \$83,000.00, in 2245 to \$83,500.00, in 2247 to \$84,000.00, in 2249 to \$84,500.00, in 2251 to \$85,000.00, in 2253 to \$85,500.00, in 2255 to \$86,000.00, in 2257 to \$86,500.00, in 2259 to \$87,000.00, in 2261 to \$87,500.00, in 2263 to \$88,000.00, in 2265 to \$88,500.00, in 2267 to \$89,000.00, in 2269 to \$89,500.00, in 2271 to \$90,000.00, in 2273 to \$90,500.00, in 2275 to \$91,000.00, in 2277 to \$91,500.00, in 2279 to \$92,000.00, in 2281 to \$92,500.00, in 2283 to \$93,000.00, in 2285 to \$93,500.00, in 2287 to \$94,000.00, in 2289 to \$94,500.00, in 2291 to \$95,000.00, in 2293 to \$95,500.00, in 2295 to \$96,000.00, in 2297 to \$96,500.00, in 2299 to \$97,000.00, in 2301 to \$97,500.00, in 2303 to \$98,000.00, in 2305 to \$98,500.00, in 2307 to \$99,000.00, in 2309 to \$99,500.00, in 2311 to \$100,000.00, in 2313 to \$100,500.00, in 2315 to \$101,000.00, in 2317 to \$101,500.00, in 2319 to \$102,000.00, in 2321 to \$102,500.00, in 2323 to \$103,000.00, in 2325 to \$103,500.00, in 2327 to \$104,000.00, in 2329 to \$104,500.00, in 2331 to \$105,000.00, in 2333 to \$105,500.00, in 2335 to \$106,000.00, in 2337 to \$106,500.00, in 2339 to \$107,000.00, in 2341 to \$107,500.00, in 2343 to \$108,000.00, in 2345 to \$108,500.00, in 2347 to \$109,000.00, in 2349 to \$109,500.00, in 2351 to \$110,000.00, in 2353 to \$110,500.00, in 2355 to \$111,000.00, in 2357 to \$111,500.00, in 2359 to \$112,000.00, in 2361 to \$112,500.00, in 2363 to \$113,000.00, in 2365 to \$113,500.00, in 2367 to \$114,000.00, in 2369 to \$114,500.00, in 2371 to \$115,000.00, in 2373 to \$115,500.00, in 2375 to \$116,000.00, in 2377 to \$116,500.00, in 2379 to \$117,000.00, in 2381 to \$117,500.00, in 2383 to \$118,000.00, in 2385 to \$118,500.00, in 2387 to \$119,000.00, in 2389 to \$119,500.00, in 2391 to \$120,000.00, in 2393 to \$120,500.00, in 2395 to \$121,000.00, in 2397 to \$121,500.00, in 2399 to \$122,000.00, in 2401 to \$122,500.00, in 2403 to \$123,000.00, in 2405 to \$123,500.00, in 2407 to \$124,000.00, in 2409 to \$124,500.00, in 2411 to \$125,000.00, in 2413 to \$125,500.00, in 2415 to \$126,000.00, in 2417 to \$126,500.00, in 2419 to \$127,000.00, in 2421 to \$127,500.00, in 2423 to \$128,000.00, in 2425 to \$128,500.00, in 2427 to \$129,000.00, in 2429 to \$129,500.00, in 2431 to \$130,000.00, in 2433 to \$130,500.00, in 2435 to \$131,000.00, in 2437 to \$131,500.00, in 2439 to \$132,000.00, in 2441 to \$132,500.00, in 2443 to \$133,000.00, in 2445 to \$133,500.00, in 2447 to \$134,000.00, in 2449 to \$134,500.00, in 2451 to \$135,000.00, in 2453 to \$135,500.00, in 2455 to \$136,000.00, in 2457 to \$136,500.00, in 2459 to \$137,000.00, in 2461 to \$137,500.00, in 2463 to \$138,000.00, in 2465 to \$138,500.00, in 2467 to \$139,000.00, in 2469 to \$139,500.00, in 2471 to \$140,000.00, in 2473 to \$140,500.00, in 2475 to \$141,000.00, in 2477 to \$141,500.00, in 2479 to \$142,000.00, in 2481 to \$142,500.00, in 2483 to \$143,000.00, in 2485 to \$143,500.00, in 2487 to \$144,000.00, in 2489 to \$144,500.00, in 2491 to \$145,000.00, in 2493 to \$145,500.00, in 2495 to \$146,000.00, in 2497 to \$146,500.00, in 2499 to \$147,000.00, in 2501 to \$147,500.00, in 2503 to \$148,000.00, in 2505 to \$148,500.00, in 2507 to \$149,000.00, in 2509 to \$149,500.00, in 2511 to \$150,000.00, in 2513 to \$150,500.00, in 2515 to \$151,000.00, in 2517 to \$151,500.00, in 2519 to \$152,000.00, in 2521 to \$152,500.00, in 2523 to \$153,000.00, in 2525 to \$153,500.00, in 2527 to \$154,000.00, in 2529 to \$154,500.00, in 2531 to \$155,000.00, in 2533 to \$155,500.00, in 2535 to \$156,000.00, in 2537 to \$156,500.00, in 2539 to \$157,000.00, in 2541 to \$157,500.00, in 2543 to \$158,000.00, in 2545 to \$158,500.00, in 2547 to \$159,000.00, in 2549 to \$159,500.00, in 2551 to \$160,000.00, in 2553 to \$160,500.00, in 2555 to \$161,000.00, in 2557 to \$161,500.00, in 2559 to \$162,000.00, in 2561 to \$162,500.00, in 2563 to \$163,000.00, in 2565 to \$163,500.00, in 2567 to \$164,000.00, in 2569 to \$164,500.00, in 2571 to \$165,000.00, in 2573 to \$165,500.00, in 2575 to \$166,000.00, in 2577 to \$166,500.00, in 2579 to \$167,000.00, in 2581 to \$167,500.00, in 2583 to \$168,000.00, in 2585 to \$168,500.00, in 2587 to \$169,000.00, in 2589 to \$169,500.00, in 2591 to \$170,000.00, in 2593 to \$170,500.00, in 2595 to \$171,000.00, in 2597 to \$171,500.00, in 2599 to \$172,000.00, in 2601 to \$172,500.00, in 2603 to \$173,000.00, in 2605 to \$173,500.00, in 2607 to \$174,000.00, in 2609 to \$174,500.00, in 2611 to \$175,000.00, in 2613 to \$175,500.00, in 2615 to \$176,000.00, in 2617 to \$176,500.00, in 2619 to \$177,000.00, in 2621 to \$177,500.00, in 2623 to \$178,000.00, in 2625 to \$178,500.00, in 2627 to \$179,000.00, in 2629 to \$179,500.00, in 2631 to \$180,000.00, in 2633 to \$180,500.00, in 2635 to \$181,000.00, in 2637 to \$181,500.00, in 2639 to \$182,000.00, in 2641 to \$182,500.00, in 2643 to \$183,000.00, in 2645 to \$183,500.00, in 2647 to \$184,000.00, in 2649 to \$184,500.00, in 2651 to \$185,000.00, in 2653 to \$185,500.00, in 2655 to \$186,000.00, in 2657 to \$186,500.00, in 2659 to \$187,000.00, in 2661 to \$187,500.00, in 2663 to \$188,000.00, in 2665 to \$188,500.00, in 2667 to \$189,000.00, in 2669 to \$189,500.00, in 2671 to \$190,000.00, in 2673 to \$190,500.00, in 2675 to \$191,000.00, in 2677 to \$191,500.00, in 2679 to \$192,000.00, in 2681 to \$192,500.00, in 2683 to \$193,000.00, in 2685 to \$193,500.00, in 2687 to \$194,000.00, in 2689 to \$194,500.00, in 2691 to \$195,000.00, in 2693 to \$195,500.00, in 2695 to \$196,000.00, in 2697 to \$196,500.00, in 2699 to \$197,000.00, in 2701 to \$197,500.00, in 2703 to \$198,000.00, in 2705 to \$198,500.00, in 2707 to \$199,000.00, in 2709 to \$199,500.00, in 2711 to \$200,000.00, in 2713 to \$200,500.00, in 2715 to \$201,000.00, in 2717 to \$201,500.00, in 2719 to \$202,000.00, in 2721 to \$202,500.00, in 2723 to \$203,000.00, in 2725 to \$203,500.00, in 2727 to \$204,000.00, in 2729 to \$204,500.00, in 2731 to \$205,000.00, in 2733 to \$205,500.00, in 2735 to \$206,000.00, in 2737 to \$206,500.00, in 2739 to \$207,000.00, in 2741 to \$207,500.00, in 2743 to \$208,000.00, in 2745 to \$208,500.00, in 2747 to \$209,000.00, in 2749 to \$209,500.00, in 2751 to \$210,000.00, in 2753 to \$210,500.00, in 2755 to \$211,000.00, in 2757 to \$211,500.00, in 2759 to \$212,000.00, in 2761 to \$212,500.00, in 2763 to \$213,000.00, in 2765 to \$213,500.00, in 2767 to \$214,000.00, in 2769 to \$214,500.00, in 2771 to \$215,000.00, in 2773 to \$215,500.00, in 2775 to \$216,000.00, in 2777 to \$216,500.00, in 2779 to \$217,000.00, in 2781 to \$217,500.00, in 2783 to \$218,000.00, in 2785 to \$218,500.00, in 2787 to \$219,000.00, in 2789 to \$219,500.00, in 2791 to \$220,000.00, in 2793 to \$220,500.00, in 2795 to \$221,000.00, in 2797 to \$221,500.00, in 2799 to \$222,000.00, in 2801 to \$222,500.00, in 2803 to \$223,000.00, in 2805 to \$223,500.00, in 2807 to \$224,000.00, in 2809 to \$224,500.00, in 2811 to \$225,000.00, in 2813 to \$225,500.00, in 2815 to \$226,000.00, in 2817 to \$226,500.00, in 2819 to \$227,000.00, in 2821 to \$227,500.00, in 2823 to \$228,000.00, in 2825 to \$228,500.00, in 2827 to \$229,000.00, in 2829 to \$229,500.00, in 2831 to \$230,000.00, in 2833 to \$230,500.00, in 2835 to \$231,000.00, in 2837 to \$231,500.00, in 2839 to \$232,000.00, in 2841 to \$232,500.00, in 2843 to \$233,000.00, in 2845 to \$233,500.00, in 2847 to \$234,000.00, in 2849 to \$234,500.00, in 2851 to \$235,000.00, in 2853 to \$235,500.00, in 2855 to \$236,000.00, in 2857 to \$236,500.00, in 2859 to \$237,000.00, in 2861 to \$237,500.00, in 2863 to \$238,000.00, in 2865 to \$238,500.00, in 2867 to \$239,000.00, in 2869 to \$239,500.00, in 2871 to \$240,000.00, in 2873 to \$240,500.00, in 2875 to \$241,000.00, in 2877 to \$241,500.00, in 2879 to \$242,000.00, in 2881 to \$242,500.00, in 2883 to \$243,000.00, in 2885 to \$243,500.00, in 2887 to \$244,000.00, in 2889 to \$244,500.00, in 2891 to \$245,000.00, in 2893 to \$245,500.00, in 2895 to \$246,000.00, in 2897 to \$246,500.00, in 2899 to \$247,000.00, in 2901 to \$247,500.00, in 2903 to \$248,000.00, in 2905 to \$248,500.00, in 2907 to \$249,000.00, in 2909 to \$249,500.00, in 2911 to \$250,000.00, in 2913 to \$250,500.00, in 2915 to \$251,000.00, in 2917 to \$251,500.00, in 2919 to \$252,000.00, in 2921 to \$252,500.00, in 2923 to \$253,000.00, in 2925 to \$253,500.00, in 2927 to \$254,000.00, in 2929 to \$254,500.00, in 2931 to \$255,000.00, in 2933 to \$255,500.00, in 2935 to \$256,000.00, in 2937 to \$256,500.00, in 2939 to \$257,000.00, in 2941 to \$257,500.00, in 2943 to \$258,000.00, in 2945 to \$258,500.00, in 2947 to \$259,000.00, in 2949 to \$259,500.00, in 2951 to \$260,000.00, in 2953 to \$260,500.00, in 2955 to \$261,000.00, in 2957 to \$261,500.00, in 2959 to \$262,000.00, in 2961 to \$262,500.00, in 2963 to \$263,000.00, in 2965 to \$263,500.00, in 2967 to \$264,000.00, in 2969 to \$264,500.00, in 2971 to \$265,000.00, in 2973 to \$265,500.00, in 2975 to \$266,000.00, in 2977 to \$266,500.00, in 2979 to \$267,000.00, in 2981 to \$267,500.00, in 2983 to \$268,000.00, in 2985 to \$268,500.00, in 2987 to \$269,000.00, in 2989 to \$269,500.00, in 2991 to \$270,000.00, in 2993 to \$270,500.00, in 2995 to \$271,000.00, in 2997 to \$271,500.00, in 2999 to \$272,000.00, in 3001 to \$272,500.00, in 3003 to \$273,000.00, in 3005 to \$273,500.00, in 3007 to \$274,000.00, in 3009 to \$274,500.00, in 3011 to \$275,000.00, in 3013 to \$275,500.00, in 3015 to \$276,000.00, in 3017 to \$276,500.00, in 3019 to \$277,000.00, in 3021 to \$277,500.00, in 3023 to \$278,000.00, in 3025 to \$278,500.00, in 3027 to \$279,000.00, in 3029 to \$279,500.00, in 3031 to \$280,000.00, in 3033 to \$280,500.00, in 3035 to \$281,000.00, in 3037 to \$281,500.00, in 3039 to \$282,000.00, in 3041 to \$282,500.00, in 3043 to \$283,000.00, in 3045 to \$283,500.00, in 3047 to \$284,000.00, in 3049 to \$284,500.00, in 3051 to \$285,000.00, in 3053 to \$285,500.00, in 3055 to \$286,000.00, in 3057 to \$286,500.00, in 3059 to \$287,000.00, in 3061 to \$287,500.00, in 3063 to \$288,000.00, in 3065 to \$288,500.00, in 3067 to \$289,000.00, in 3069 to \$289,500.00, in 3071 to \$290,000.00, in 3073 to \$290,500.00, in 3075 to \$291,000.00, in 3077 to \$291,500.00, in 3079 to \$292,000.00, in 3081 to \$292,500.00, in 3083 to \$293,000.00, in 3085 to \$293,500.00, in 3087 to \$294,000.00, in 3089 to \$294,500.00, in 3091 to \$295,000.00, in 3093 to \$295,500.00, in 3095 to \$296,000.00, in 3097 to \$296,500.00, in 3099 to \$297,000.00, in 3101 to \$297,500.00, in 3103 to \$298,000.00, in 3105 to \$298,500.00, in 3107 to \$299,000.00, in 3109 to \$299,500.00, in 3111 to \$300,000.00, in 3113 to \$300,500.00, in 3115 to \$301,000.00, in 3117 to \$301,500.00, in 3119 to \$302,000.00, in 3121 to \$302,500.00, in 3123 to \$303,000.00, in 3125 to \$303,500.00, in 3127 to \$304,000.00, in 3129 to \$304,500.00, in 3131 to \$305,000.00, in 3133 to \$305,500.00, in 3135 to \$306,000.00, in 3137 to \$306,500.00, in 3139 to \$307,000.00, in 3141 to \$307,500.00, in 3143 to \$308,000.00, in 3145 to \$308,500.00, in 3147 to \$309,000.00, in 3149 to \$309,500.00, in 3151 to \$310,000.00, in 3153 to \$310,500.00, in 3155 to \$311,000.00, in 3157 to \$311,500.00, in 3159 to \$312,000.00, in 3161 to \$312,500.00, in 3163 to \$313,000.00, in 3165 to \$313,500.00, in 3167 to \$314,000.00, in 3169 to \$314,500.00, in 3171 to \$315,000.00, in 3173 to \$315,500.00, in 3175 to \$316,000.00, in 3177 to \$316,500.00, in 3179 to \$317,000.00, in 3181 to \$317,500.00, in 3183 to \$318,000.00, in 3185 to \$318,500.00, in 3187 to \$319,000.00, in 3189 to \$319,500.00,

The employment continued through the years, until approximately March 15, 1948, when Eyer decided to quit. Prior to that, on March 1, 1947, Eyer had gone to Arizona for his health, staying there seven weeks. He came back but apparently did not spend much time in the store, although he testified that he had charge of sales until January 1, 1948, that he actually managed the department from the time he returned from Tucson until September 1, 1947, and that he claimed commissions for the entire year of 1947.

According to Eyer, around January 1, 1922, he stated to Read that he "would prefer to continue on a salary plus a commission basis, rather than a partnership arrangement", to which Eyer stated Read replied, "It is just as you wish, Lloyd." They did not at that time agree what the salary and commissions would be.

Read denies any agreement as to commissions and claims that when the salary was raised to \$3000.00 in 1929 that was full payment of and in lieu of any commissions.

On cross examination Eyer was asked whether or not at the time in 1929 when the salary was increased it was not with the understanding "that the salary was raised from the amount included and that that raise included the commissions." He replied, "I think he did make that statement." However, Eyer's testimony throughout is to the effect that he constantly claimed commissions and frequently spoke to Read about it, and claims that through the years he was paid on account of commissions, that "there was never a year between 1922 and 1948 but what some payment of some amount was made;" that while there was not an exact agreement as to the amount of commissions "all the way from two to at least six times each year, I approached Mr. Read as to the possibility of getting together

The only person who was involved in the years, until approximately March 15, 1945, when they decided to quit. Prior to that, on March 1, 1945, they had gone to Alhambra for the night, staying there over night. He came back but apparently did not spend much time in the store, although he testified that he had a change of salary from January 1, 1945, that he actually managed the department from the time he returned from prison until September 1, 1945, and that he obtained permission for the entire year of 1945.

According to the report dated January 1, 1945, he stated that he had no "would prefer to continue on a salary basis" rather than a "percentage arrangement", to which they stated they would not agree. "It is just as you wish, Lloyd." They did not at that time agree that the salary and commission would be.

Heard makes any agreement as to commission and states that when the salary was raised to \$300.00 in 1945 that was full payment of and in lieu of any commission.

On cross examination they were asked whether or not at the time in 1945 when the salary was increased it was with the understanding "that the salary was raised from the amount received and that this included the commission." He replied, "I think in 1945 when that was raised." However, they testified throughout is the fact that he consistently obtained commission and frequently asked for that in and during that through the years he was paid an amount of commission, that there was never a year between 1945 and 1946 that some amount of some amount was paid; that while there was no exact agreement as to the amount of commission "all the way from 1945 to 1946 and thereafter each year, I approached Mr. Lloyd as to the possibility of getting together

and deciding on a definite commission percentage on the total sales', to which Eyer states Read replied, "Well, Lloyd, we just must get together on this and I will do it just as soon as I can." Eyer, however, admits that Read never told him he wanted to pay commissions.

The parties stipulated that W. B. Read & Co. made payments outside of the salary to Eyer as follows: For 1922, \$900.00; for 1923, \$300.00; for 1924, \$250.00; for 1925, \$1150.00; for 1926, \$450.00; for 1927, \$1100.00; for 1928, \$1150.00; for 1929, \$1665.00; for 1930, \$1350.00; for 1931, \$1125.00; for 1932, \$600.00; for 1933, \$200.00; for 1934, \$200.00; for 1935, \$150.00; for 1936, \$190.00; for 1937, \$176.00; for 1938, \$370.00; for 1939, \$150.00; for 1940, \$185.00; for 1941, \$300.00; for 1942, \$300.00; for 1943, \$200.00; for 1944, \$125.00; for 1945, \$338.18; and for 1946, \$200.00.

Eyer testified that those sums were never given to him voluntarily; that he always took the initiative. Read testified that these payments were loans and were made at Eyer's request and used by Eyer in meeting specific obligations, and were carried on his books as loans. The books do not show these payments to be loans, with the exception of one loan of \$700.00 made when Eyer's health forced him to go to Arizona. Read denies that there was ever any agreement to pay commissions. Eyer's position is that these payments were on account of commissions.

Read also stated that W. B. Read & Co. did not take deductions on "income taxes for these 'loans'." This assertion is contradicted by the Internal Revenue Department Forms W-2 for the years 1943, 1944, 1945, 1946, and 1947, which were admitted in evidence and which show that for those years income tax was withheld by W. B. Read & Co. on gross amounts paid to Eyer, which included both the salary and the additional payments whose nature is here disputed.

It is therefore clear that as to the years for which there is evidence available, that what Read testified were loans and Eyer maintains were payments on account of commission, were treated as payments of earnings to Eyer on which income tax was withheld.

Mr. Read stated that there was a complete settlement of the matter of commissions in 1929, when he advanced Eyer's salary, and told Eyer that from then on there was no use of talking commissions.

Mr. Read, however, testified that as of the date of his testimony, July 21, 1948, Eyer owed for what Read termed advancements and what Eyer contends were payments on account of commissions, the sum of \$14,916.00. The record not only shows that the payments each year to Eyer without interruption from 1922 through 1946 were a part of that total of \$14,916.00, but that that figure includes payments made in 1929 and prior years. There is no indication that any part of the \$14,916.00 was ever cancelled. Actually the amount paid Eyer over his base salary continued to be as large in the years 1930 and 1931 as in previous years. Following that payments were reduced because of the depression.

In support of defendants' claim that the advancements to Eyer were loans, Howard Read testified to loans to other employees. However, in the case of Mr. Vollrath, who had one loan of \$1,500.00 and another of approximately \$700.00 or \$800.00, a demand note was taken by W. B. Read & Co. In the cases of Mr. Powell, Mr. Grove, Mr. Putnam and Mr. Freese, the sums loaned them were carried as book accounts. In response to a question as to whether these items were always repaid to W. B. Read & Co. Mr. Howard Read testified "yes, sir." While Mr. Read did testify as to his having spoken to Eyer about letting his loans get too large, there is no evidence of any payment either of principal or interest, except the alleged settlement in 1929.

It is further stated that a letter from the writer to the
 evidence available, that when first received from Jones and that
 was received by the writer of the letter, was dated as follows: 1937-
 1938 to 1939 on which Jones had no reply.

12. It is stated that there was a copy of the letter to the
 writer of the letter in 1939, when it was received from Jones, and that
 the letter from Jones to the writer was dated as follows: 1937-
 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595,

The evidence also showed that when Mr. Eyer, on his physicians advice, asked for a six months leave of absence beginning September 1, 1947, and stated to Mr. Read that he did not expect compensation to be paid him during that period, but that he would like to draw \$300 a month on commissions which were owing to him, Mr. Read gave Eyer six checks of \$300 each. On the first of these checks in Mr. Read's handwriting appear the words "on commission a/c," and upon subsequent checks those same words were written in Eyer's handwriting by way of endorsement. No question was ever raised as to the propriety of these endorsements.

The evidence shows no express agreement by Read to pay Eyer any certain percentage or amount of commissions. Plaintiff admits the absence of such an agreement in his pleadings. Plaintiff contends that it is not necessary to prove an express contract for the payment of a certain amount of compensation, but that once the agreement to pay salary and commissions is established by the evidence, an implied agreement to pay a reasonable compensation by way of salary and commission is raised by law upon the theory of quantum meruit. In support of this contention plaintiff cites Morse v. Estate of Carlson, 365 Ill. 482 and Humphreys v. Orrey, 220 Ill. App. 523. Defendants' contention in reply is that a contract for services so indefinite in terms as the one at bar is unenforceable, Peck v. McCormick Harvesting Machine Co., 94 Ill. App. 586; Ibold v. 3920 Lake Shore Drive Building Corp., 326 Ill. App. 257, and that there is a presumption of law that for services rendered by an employee, paid for by salary, during the period for which he is employed, are in full for all services, and to overcome this presumption, the employee must show an express agreement for extra compensation. Defendants cite Levi v. Reid, 91 Ill. App. 430; Sidway v. The South Park Commissioners, 120 Ill. 496; Western Manufacturers Mutual Insurance Co. v. Boughton, 136 Ill. 317. Insofar as the Peck case, supra, is concerned,

The evidence also shows that when Mr. Geyer, on his resignation, asked for a six month leave of absence from December 1, 1917, and stated to Mr. Geyer that he did not expect compensation to be paid him during that period, but that he would like to draw \$300 a month on commission which were owing to him, Mr. Geyer gave him six checks of \$500 each. On the first of these checks is Mr. Geyer's handwriting which was written "on commission 2/27" and upon endorsement checks these words were written in Geyer's handwriting "by way of compensation". No mention was made as to the property of these commissions.

The evidence shows no express agreement or deal to pay Geyer any certain amount or amount of commission. It is true that the evidence of such an agreement in his handwriting, but it is not necessary to prove an express contract for the payment of a certain amount of compensation, but that once the agreement to pay salary and commission is established by the evidence, an implied agreement to pay a reasonable amount by way of salary and commission is raised by the upon the theory of *quantum meruit*. In support of this contention plaintiff offers *Johnson v. Johnson*, 305 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

that case was decided against the agent who sought to recover by way of recoupment for damages from breach of contract to pay commissions because the contract, being oral, not fully performed, and not to be performed within one year was held within the Statute of Frauds. In the Lake Shore case, supra, plaintiff sued upon an express contract which was held unenforceable since it provided that compensation was "not to exceed 4% of gross rental income" and the court there held that since the quoted salary provision only set the maximum salary it was lacking in mutuality. No claim was made upon an implied contract. We do not regard those cases as controlling. Plaintiff makes no claim to an express contract. He sues in quantum meruit to recover only the reasonable salary and commissions that he asserts are due him for services which were already fully rendered to defendants at the time suit was started.

Levi v. Reid, supra, is likewise distinguishable from the facts of the case at bar. There the employee voluntarily worked extra hours, was paid a weekly wage for his work, but kept a secret account of his overtime and made no mention of any demand for overtime pay until his employment was terminated. The court held that there was no implied agreement to pay for work voluntarily done, and that the employee waived any claim to overtime pay by accepting his weekly wages knowing that his employer regarded the wages as payment in full for the week's work. The court stated:

" . . . the course of dealing between the parties makes it apparent beyond controversy that neither party regarded the so-called overtime service as rendered under an implied contract for extra pay."

In the case at bar there is testimony the commissions were frequently discussed by Eyer and W. B. Read, that payments of some nature over and above salary were actually paid, and the controversy is as to whether or not

that case was decided against the agent who sought to recover by way of
recompense for damages from breach of contract to act as a salesman because
the contract, being oral, not fully performed, and not to be performed
within one year was held within the "statute of frauds". In the latter
case, *Smith v. Smith*, plaintiff sued upon an express contract which was held unen-
forceable since it provided that compensation was "not to exceed \$1000".
These words "not to exceed" and the court there held that since the stated salary
provision only set the maximum salary it was lacking in definiteness. No
claim was made upon an implied contract. We do not repeat those cases
as controlling. Plaintiff makes no claim as an express contract. He
seeks in *Smith v. Smith* to recover only the reasonable salary and counsel
admits that he ascertains and due his for services which were already fully
rendered to defendant at the time suit was started.

Levi v. Reid, supra, is likewise distinguishable from the facts
of the case at bar. There the employee voluntarily worked extra hours, was
paid a weekly wage for his work, but kept a secret account of his overtime
and made no mention of any demand for overtime pay until his employment
was terminated. The court held that there was no implied agreement to
pay for work voluntarily done, and that the employee waived his claim to
overtime pay by accepting his weekly wage, knowing that his employer re-
garded the wage as payment in full for the week's work. The court stated:
". . . the course of dealing between the parties shows it to be

beyond controversy that either party regarded the so-called overtime
service as rendered under an implied contract for extra pay."
In the case at bar there is testimony the conversations were frequently dis-
cussed by Lyon and W. H. Reid, that payments of one hundred over and above
salary were regularly paid, and one controversy is as to whether or not

there was an implied agreement to pay commissions. In the Levi case, supra, the nature of the agreement for compensation was clear: it was for a stipulated wage. Here the dispute centers over whether or not the facts and circumstances raised an implied promise to pay a reasonable amount of commissions in addition to salary. Again, in Sidway v. South Park Commissioners, supra, the nature of the agreement for compensation was undisputed, extra services were rendered by the employee in question outside of his usual duties, and extra compensation was denied him because the Appellate Court found as a matter of fact that the services for which the suit was brought were rendered without any promise, express or implied, to pay for such services. Here it is the duties of the plaintiff which are undisputed, but his compensation which is in doubt. In Western Manufacturers Mutual Ins. Co. v. Boughton, supra, a careful reading of that case only indicates an affirmance of the judgment of the Appellate Court affirming a jury verdict finding that Boughton was entitled to damages for wrongful discharge and for extra compensation for services rendered over and above his contractual duties for which he was paid at the contractual rate. That case contradicts defendant in his assertion that an express agreement must be shown for extra compensation where a salary is paid.

Considering the evidence to which we have alluded above, and disregarding the evidence concerning admissions of fact made during settlement negotiations, to which objection was made by defendant, and without deciding the propriety or impropriety of such evidence, we find as a matter of fact that the facts and circumstances shown by the evidence raised an implied agreement by W. B. Read & Co. and Eyer, whereby Eyer was to be paid upon a salary plus commission basis. In 1922 W. B. Read assented to a salary and commission basis for Eyer. Assuming W. B. Read is correct, if there

[illegible]

was no such agreement as to the basis of compensation, then the 1929 "settlement" was meaningless, for there was nothing to settle with Eyer. In any event, after 1929 events proceeded as before and as late as the date of the hearing Read still contended that Eyer owed him for the "loans" made prior to that date. We give credence to Eyer's contentions that such an understanding existed, because we cannot reconcile Read's testimony that the fluctuating yearly payments over and above salary made to Eyer were loans in face of the undisputed facts that they were listed as income to Eyer on Read's books, that withholding tax was paid upon these payments by W. B. Read & Co., and while loans made to other employees were repaid by them, nothing was ever repaid by Eyer on the amounts Read contends were loans.

It follows as a matter of law that Eyer is entitled to recover reasonable commissions from W. B. Read & Co.. The period for which such recovery is allowable under the Statute of Limitations being also in dispute we hold as a matter of law under the evidence that Eyer is entitled to recover only for the five years next preceding the filing of his complaint. Decisive of this point is Miller v. Cinnamon, 168 Ill. 447, 452, wherein it is stated:

"Where one is employed under a general agreement which fixes no term of service, and continues in service a long time, the hiring will be treated as a hiring by the year; and, in case of such long continued employment, the statute will ordinarily bar a claim for all outside of the five years immediately before the commencement of the action, unless there is evidence to take it out of the operation of the statute. . . ."

The record shows that the complaint was filed July 6, 1948. Plaintiff contends that the payments made in prior years which we find

was no such agreement as to the basis of compensation, then the 1939 "settling" was tantamount, for there was nothing to settle with them.

In any event, after 1939 events proceeded as before and as late as the date of the Family Book still maintained that they were the "Lions" made prior to that date. No one objected to your contact with them and an understanding existed, because we cannot reconcile the fact that the

the first meeting party papers over and above being sent to your name. Issues in case of the undistributed books that they were listed as issues to your or Grand's books, that distribution was held upon the papers by W. L. Jones & Co., and while Jones was in charge of the company were by them, nothing was ever repaid by them on the amount of the books were Jones.

It follows as a matter of law that you are entitled to recover reasonable compensation from W. L. Jones & Co., the period for which such recovery is allowable under the Statute of Limitations being also in dispute we hold as a matter of law under the evidence that you are entitled to recover only for the five years next preceding the filing of this complaint. Decisive of this point is Miller v. Thompson, 100 Ill. App. 422.

Whereas it is stated:

"Whereas one is employed under a personal agreement which fixes no term of service, and continues in service a long time, the hiring will be deemed as a hiring by the year; and, in case of such long continued employment, the statute will accordingly bar a claim for all services of the five years immediately before the commencement of the action, unless there is evidence to take it out of the operation of the statute."

The record shows that the complaint was filed July 6, 1939.

Plaintiff contends that the payments made in prior years which he filed

as a matter of fact to be on account of commissions, should be construed as payments on a running account which coupled with evidence of promises made to pay the back account are sufficient to remove the bar of the Statute. We do not regard plaintiff's contention as sustained by the evidence. Certainly there is nothing in the evidence to show an affirmative intention by the defendants to make the yearly payments apply on the commissions accruing before the year in which the payments were made. There is no showing on the part of the debtor to waive the bar of the Statute. All the payments made in the five years preceding July 6, 1948 over and above salary would together amount to less than the amount plaintiff claims is due him for that period alone. In *Miller v. Cinnamon*, supra, the Court stated, at page 456:

"The mere fact, that a debtor, who owes an account, pays a sum not more than sufficient to cover items of recent origin, without proof of an intention that such payment is to apply to items of older date barred by the Statute of Limitations, is not sufficient of itself to relieve such barred items from the operation of the statute. (*Crum v. Higold*, 32 Ill.App. 282)."

For the reasons that to do otherwise would evade the manifest purpose of the Statute of Limitations, and would ignore the yearly nature of the commission payments, there being nothing in the evidence to suggest otherwise, the payments made within the 5 years preceding the filing of the suit should be applied upon the reasonable commissions found due for that same period.

The evidence as to the amount of such commissions may be briefly stated. Three witnesses testified as to the reasonable and customary payment for services such as Eyer rendered W. H. Read & Co. One, Eyer's son, testified that that figure would be 3% of gross sales; another, Meyers,

as a matter of fact to be on account of consideration, should be considered
as payment on a money loan, which would be subject to the payment of interest
and to pay the bank account and collection to receive the sum of the
of which, as to not being paid in consideration as stated by the
evidence. It is not in the evidence to show an admission
five limitation of the reference to make the party payment apply on the
consideration account before the part in which the payment was made. There
is no showing of the part of the action to value the sum of the limitation.
All the payment was in the five years preceding July 1, 1913 and
about salary would be subject to the payment of interest and the amount of the
is due him for that period also. In *William v. Simpson*, 100 Cal. 200, 33
stated, at page 200:
"The same fact, that a salary, who even an account, have a sum not more
than \$10,000, is a cover item of no account, which would be an in-
tion that such payment is to apply to the sum of other the period of the
Statute of limitation, is not sufficient of itself to value such period
from the operation of the statute. (See *W. H. H. v. H. H. H.*, 100 Cal. 200, 33.)"
For the reasons that it is otherwise would evade the limitation
purpose of the Statute of limitation, and would ignore the policy of the
of the limitation period, it is not binding on the evidence to show
otherwise, the payment was within the 5 years preceding the filing of
the suit should be applied on the payment of consideration to the sum for
that same period.
The evidence as to the amount of such consideration was not really
stated. Three witnesses testified as to the amount of the payment and
and for a review of the evidence in *W. H. H. v. H. H. H.*, 100 Cal. 200, 33
testified that the amount of the payment was \$10,000, which was the

that the compensation for such a position would be \$5,000 per year; the last witness, Himes, testified that the compensation would be between \$400 and \$500 per month. No objection was made to the testimony of these witnesses in this particular. Averaging the mean compensation testified to by Himes with the figure testified to by Meyers, with the results obtained by multiplying the gross sales by 3%, the gross figure of \$25,508.29 is obtained as the fair, usual and customary compensation paid for services such as those rendered by the plaintiff. From this gross figure must be deducted a total of \$17,553.23, representing payments made to Eyer and merchandise purchased by him from W. B. Read & Co. We therefore find that there is due to the plaintiff the sum of \$7,955.06. In view of the complex account and the age and health of Mr. W. B. Read, we do not find that the defendants have been guilty of any vexatious delay in payment so as to entitle plaintiff to interest as provided for by statute in such cases.

Plaintiff has suggested the death of W. B. Read, one of the partners of W. B. Read & Co., on March 19, 1951. Howard Read is the surviving partner of the firm. We find that the implied contract and the debt incurred thereby upon the evidence was for services rendered the partnership by plaintiff, and was thus a partnership obligation. Since a surviving partner is under a duty to take exclusive possession of the partnership assets, to pay its debts out of the same and settle its business, Ch. 3, Sec. 90 Ill. Rev. Stats. 1949; Bayer Grocer Co. v. McKee Shoe Co., 87 Ill. App. 434, and since the surviving partner becomes vested with the title to all the partnership property for the purpose of settling the firms affairs, Linn v. Downing, 216 Ill. 64, and has a duty to defend all suits in law on firm obligations inasmuch as by death the debt is extinguished as to the deceased member and the whole debt of the firm continues against the survivor, 40 Am. Jur.

that the compensation for such a position would be \$5,000 per year; the last witness, Miss, testified that the compensation would be between \$400 and \$500 per month. No objection was made to the testimony of these witnesses in this particular. Averaging the two compensation testified to by him with the figure testified to by her, with the results obtained by multiplying the gross sales by 31, the gross figure of \$25,501.39 is obtained as the fair, usual and customary compensation paid for services such as those rendered by the plaintiff. From this gross figure must be deducted a total of \$11,255.25, representing payments made to her and her husband purchased by him from W. B. Head & Co. We therefore find that there is due to the plaintiff the sum of \$14,246.14. In view of the complex account and the age and health of Mr. W. B. Head, we do not find that the defendants have been guilty of any vexatious delay in payment as to entitle plaintiff to interest as provided for by statute in such cases.

Plaintiff has suggested the death of W. B. Head, one of the partners of W. B. Head & Co., on March 19, 1931. Having been in the surviving partner of the firm. We find that the plaintiff's account and the debt incurred thereby upon the evidence was for services rendered the partnership of plaintiff, and was thus a partnership obligation. Since a surviving partner is under a duty to take exclusive possession of the partnership assets, to pay its debts out of the same and set up its business, 201 Ill. App. 2d 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Partnership, Sec. 318, it is our holding that judgment should be entered against Howard Read, as surviving partner of W. B. Read & Co. in the amount of \$7,955.06.

For the reasons above stated the judgment of the Circuit Court of McLean County is reversed and the cause is remanded with directions to enter judgment in favor of Lloyd Eyer, plaintiff-appellant, against Howard Read, as surviving partner of W. B. Read & Co., a partnership, in the amount of \$7,955.06.

Reversed and remanded with directions.

amount of \$7,957.00.
 For the reasons above stated the judgment of the Circuit Court
 of Adams County is hereby affirmed and the cause is remanded with directions to
 enter judgment in favor of Alpha Corp., Plaintiff, against Omega
 Corp., as surviving partner of F. W. B. & Co., a partnership, in the
 sum of \$7,957.00.

Entered and read all objections.

45243

MILTON TROY and CHARLES ANDREW
TROY, (a minor, by Milton Troy,
his father and next friend),
Plaintiffs - Appellants,

v.

JACK TROY, individually and as exe-
cutor under the last will and testa-
ment of Rose Troy, deceased, ALLEN
TROY, a minor, and CARROLL TROY, a
minor, and METROPOLITAN TRUST COMPANY
OF CHICAGO, a corporation, as trustee
under certain trusts established under
the last will and testament of Rose
Troy, deceased,
Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

345 I.A. 294

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In 1906 Isaac Troy of Chicago started the business of jobbing in buttons under the name of Chicago Pearl Button Company. He was married to Rose Troy and they had two children, Jack and Milton. Jack, the older son, went to work for his father in 1924 and Milton began working for his father later. Isaac Troy owned all of the business until November 1, 1941, when a partnership was formed with the father and his two sons, under which Jack acquired a 50% interest, Milton a 30% interest and the father retained a 20% interest. The agreement recited that the stock in trade and good will of the business had a value of \$30,000. As part of the consideration of a transfer of 80% of the business to them, Jack and Milton agreed to pay their father \$10,000 within two years. Milton went into the army in July, 1942, and was stationed at or near Battle Creek, Michigan. Isaac died intestate March 26, 1943, and Jack was appointed administrator of his

estate. On June 1, 1943, Jack, individually and as administrator of Isaac's estate, Milton and Rose, the widow, made an agreement under which the sons as surviving partners promised to pay their mother \$10,000 in weekly installments of \$40 each until the full amount was paid, or until her death. Thereunder Jack, as administrator, and Rose, the widow, transferred their interest in the partnership and the balance of \$7,351 due Isaac under the agreement of November 1, 1941, to Jack and Milton, the surviving partners. Thereupon, Jack acquired a 60% interest in the partnership and Milton a 40% interest therein. All other provisions of the partnership agreement between the father and the sons remained in effect.

Milton continued in the military service and Jack in the active management of the business. Milton drew \$30 a week from the business while he was in the service and Jack \$80 a week. Jack was married and had two children, Allen and Carroll, both minors. On August 12, 1944, the mother made her will. At that time Milton had no children. Allen and Carroll, Jack's children, were Rose's only grandchildren. In October or November, 1944, Milton requested a larger weekly salary. Jack wrote Milton that as of July 1, 1944, Jack's salary would be \$130 a week and that Milton would continue to draw \$30 a week. A substantial disagreement arose between Jack and Milton and their relationship became strained. Because of the estrangement Jack desired to acquire the entire interest in the partnership or to "throw the business into receivership." Negotiations were conducted between the brothers. Each was represented by a capable attorney. These negotiations resulted in a written dissolution agreement on August 7, 1945, under which Milton transferred his interest



in the partnership to Jack. Jack paid Milton \$19,500, which was the book value of his 40% interest. Jack assumed all of the debts of the partnership and also agreed to pay the obligation to their mother under the agreement of June 1, 1943. Rose died May 17, 1946, and letters testamentary were issued to Jack as the executor under her will. It does not appear that either Jack or Milton knew about any of the provisions^{of} their mother's will until her death. The inventory shows that her estate was valued at more than \$69,000, of which more than \$39,000 was in cash and government bonds and more than \$25,000 represented the proceeds of life insurance.

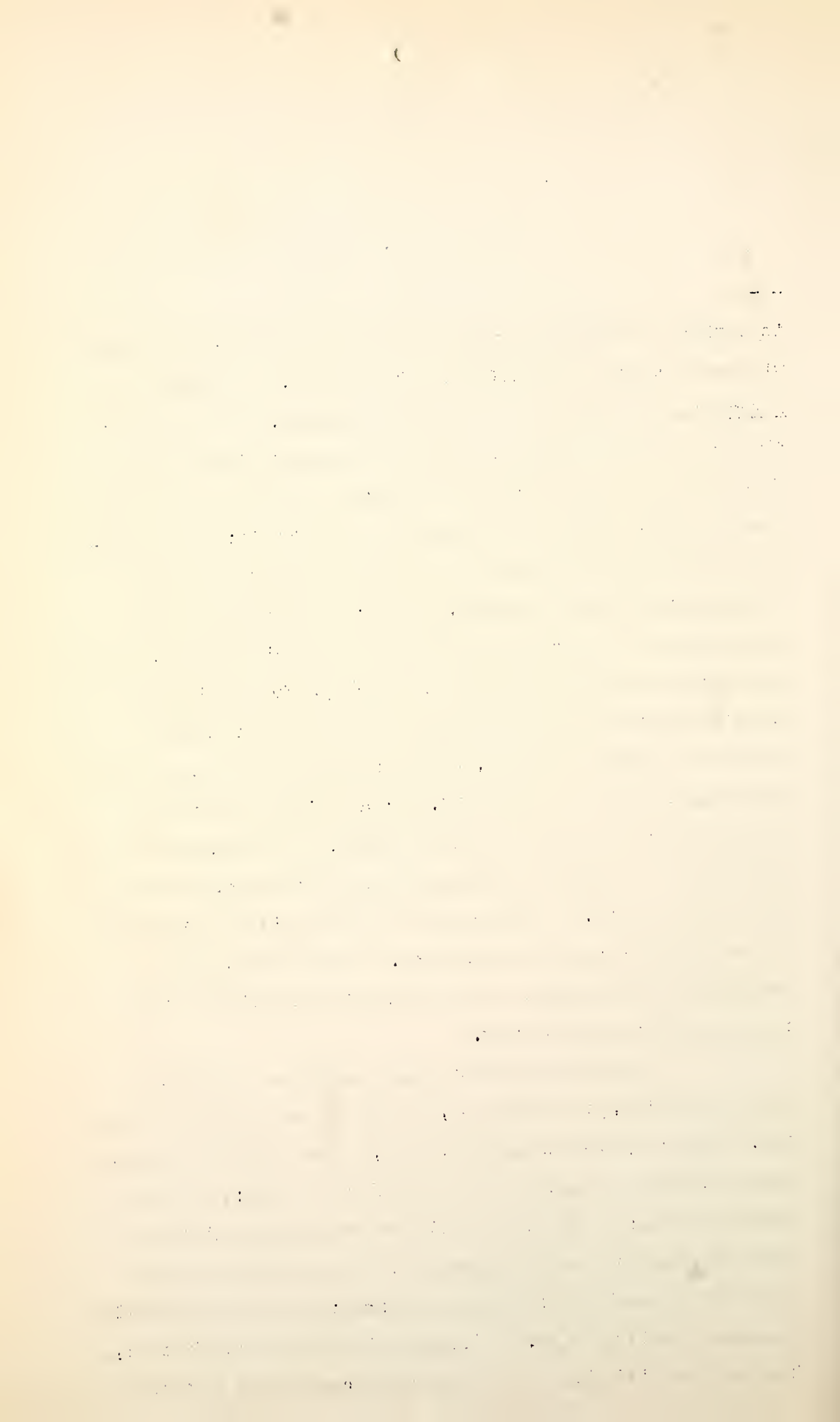
On February 10, 1948, a complaint was filed in the Circuit Court of Cook County against Jack Troy, individually and as **executor** under the last will of Rose Troy, deceased, and as trustee under certain trusts established under the will, the Metropolitan Trust Company of Chicago, as trustee, and Allen Troy and Carroll Troy, minors, in the first count of which Milton Troy alleged that Rose made a valid and binding promise to create a \$15,000 trust for his benefit, or to provide by her will or otherwise that such sum would be paid to him; that the promise was made in consideration of Milton dissolving the partnership and selling his interest to Jack; that Milton performed his part of the agreement; that Rose either created the trust by executing a declaration of trust for his (Milton's) benefit, in which event Jack, as executor of her estate, holds the estate subject to such trust or, in the alternative, that Rose did not carry out her promise; and that Milton

100

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The second part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The third part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The fourth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The fifth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The sixth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The seventh part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The eighth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The ninth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The tenth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science.

have
is entitled to the agreement specifically performed or otherwise to recover the \$15,000 from her estate. A guardian ad litem was appointed for the minor defendants. Under allegations of their answers defendants presented their theories that Rose did not promise as alleged: that if she had made such a promise there was no consideration for it; that Milton dissolved the partnership and sold his interest to Jack independent of such a promise, if any; and that Rose did not execute a declaration of trust for Milton's benefit. The case was referred to a master in chancery, who concluded that the proof did not establish the intention of Rose to create any trust for Milton, or to provide by will or otherwise that he was to receive \$15,000; and that there was no consideration for such a claimed promise. He recommended the entry of a decree dismissing the first cause of action for want of equity. Objections to the master's report stood as exceptions before the chancellor. He overruled the exceptions and entered a decree dismissing the first cause of action for want of equity.

The second count of the complaint, by Milton Troy and Charles, his minor son, sought a construction of the will. The will, made August 12, 1944, provided for the payment of debts and taxes out of the general estate; directed that her personal effects be sold and the proceeds (but not less than \$2,000) be distributed to her four brothers and sisters or their heirs residing in Europe; and made charitable bequests totaling \$7,300. In Article Five Allen and Carroll, the children of Jack, were given \$3,000 each when he or she



marries, but if either does not marry by the time he or she is 25 years of age, the legacies shall lapse and such sum shall become part of the residuary estate. The pertinent part of Article Six reads:

"All the rest, residue and remainder of my estate, real and personal, of whatever kind and nature and wheresoever situated of which I am seized or possessed or in which I have any interest at the date of my death, including all failed and lapsed legacies, I give, devise and bequeath equally between my two beloved sons, Jack and Milton Troy, upon the following terms and conditions: (a) That at the time of my death they are still co-partners in the business established by their father, to-wit, the Chicago Pearl Button Company or any other trade name, or if said business is incorporated and they each own the proportionate shares of said corporation as now owned by them in said co-partnership. In the event at the time of my death my said sons shall have dissolved their co-partnership, this residuary bequest to them and each provision thereof shall be null and void and the rest, residue and remainder of my estate shall be paid to the Metropolitan Trust Company, as Trustee to be held in trust by it for the benefit of my grandchildren, Allen Troy and Carroll Troy, as follows: (aa) The income from said trust shall accumulate until the said grandchildren each reach the ages of twenty-five years, when one-half of the principal and accumulated income shall be paid to each of them. (bb) In the event either one of said grandchildren shall die before he or she reaches the age of twenty-five years, this bequest shall be paid to his or her respective heirs-at-law. If either of said grandchildren ~~shall~~ shall die without leaving issue then this bequest shall be paid to the survivor of them. In the event both of said grandchildren shall die before they reach the age of twenty-five, this bequest shall be paid to the children of Milton Troy, if any, share and share alike, when they shall reach the age of twenty-five years. If Milton Troy should die without leaving lawful issue, then this bequest shall be paid to the Jewish Charities of Chicago, Illinois. (cc) The Trustee, the Metropolitan Trust Company, provided for in Paragraphs aa and bb, shall invest the funds of this legacy only in securities issued by the United States Government; (b) The share of my son, Milton Troy, as in this Article provided, I give, devise and bequeath to Jack Troy, as Trustee, to have and to hold the same upon the following trusts, that is to say: 1. Said Jack Troy shall invest the proceeds of said legacy, and pay the income thereof to said Milton Troy in quarterly installments during his lifetime. In the event that my son, Milton Troy, should ever be in want or so ill that he could not earn a livelihood then and in that event the Trustee hereunder, if he is satisfied as to the existence of such conditions is authorized to pay to him or for his account in installments not to exceed the sum of One Thousand Dollars



(\$1,000) in any one year. Upon the death of the said Milton Troy the Trustee shall pay said income to the child or children of said Milton Troy, if any, (if more than one child the said income shall be paid to them share and share alike) until such child or children reach the age of twenty-one years, at which time said Trustee shall pay the principal thereof to said child or children, and if the latter, in equal shares. In the event said Milton Troy shall die and shall not leave any child or children surviving him then and in that event the principal of said legacy shall be paid to Jack Troy if living and if not to his children, Allen Troy and Carroll Troy, share and share alike, when each of them reaches the age of twenty-one years. In the event one of said children shall predecease the other, the entire amount shall be paid to the survivor as hereinabove provided. In the event neither of said children shall survive the said amount shall be paid in equal shares to the child or children if any, of both said Allen Troy and Carroll Troy share and share alike and if they should die and leave no issue then the entire principal of said legacy shall be paid to the heirs-at-law of said Jack Troy share and share alike."

Plaintiffs make various allegations in support of their position for a construction of the will to the effect that it was Rose's intention that her sons share the residuary estate equally, Milton's one-half to be held in trust subject to the provisions of Paragraph (b) of Article Six; that it was not affected by the dissolution of the partnership; and in the alternative that it was Rose's intention that the one-half which Jack would have received had the partnership not been dissolved is to be held in trust for Allen and Carroll Troy, and any other children which may be hereafter born to Jack, and that the other one-half is to be held in trust for Charles and any other children which may be born to Milton. Plaintiffs pray that the court appoint a new trustee; that the court ascertain if Paragraph (aa) violates the statute against accumulations, and if so, the effect thereof on the will. Answering, Jack admitted the execution of the will and its admission to probate, but denied the

1. The first part of the paper is devoted to a general discussion of the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system has a solution for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

2. In the second part of the paper the problem of the stability of the solution of the system of equations (1) is considered. It is shown that the solution is stable for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.



allegations with respect to the construction sought by plaintiffs. A guardian ad litem appointed for the minor defendants filed a formal answer. Although the entire matter was referred to the master and some of the evidence was applicable to the construction of the will, the master's report was limited to the issues raised by the first cause of action and made no recommendation with reference to the construction of the will. The decree found that the will was ambiguous and should be construed. The chancellor construed the will in accordance with the contention of defendants, holding that it was Rose's intention that in the event at the time of her death Jack and Milton were not copartners, neither of them was to receive any portion of the residuary estate, but that it should be held in trust for the benefit of Allen and Carroll Troy; that Paragraph (b) and subparagraphs 1, 2, 3 and 4 are inapplicable; that because Jack, and Milton had dissolved their partnership, neither Jack, Milton nor Charles took any interest in the estate, and that Metropolitan Trust Company shall hold all property which it shall receive as trustee for the sole benefit of Allen and Carroll Troy. Milton and Charles, appealing, ask that the decree be reversed and that the cause be remanded with directions to enter a decree providing that Jack, as executor, be ordered to pay Milton \$15,000 together with its accretions, if any; that Jack, as executor, distribute one-half of the residuary estate to Metropolitan Trust Company for the benefit of Allen and Carroll and one-half to a trustee to be appointed for the benefit of Milton and his children under Paragraph (b), or, in the alternative, that the trust under

paragraph (a) be decreed to be for the benefit of Rose's grandchildren, per stirpes; that the court construe the provisions of paragraph (aa) of the will as being in violation of the statute against accumulations; and that the trustee thereunder be directed to distribute the income to the beneficiaries upon their attaining their respective majorities.

We turn to a consideration of Milton's contention that the court erred in failing to decree that he was entitled to the \$15,000 claimed by him; that he is entitled to have Rose's promise specifically performed, or otherwise to recover the \$15,000 promised to him from her estate; and that Jack is chargeable as a constructive trustee of the \$15,000 promised him by Rose. Plaintiff asserts that the promise was established by the testimony of three independent and disinterested witnesses, namely, Erna Klinck, Rae Dziubaniuk and Isidore Gordon, and by a memorandum left by Rose, written in her own handwriting in Jewish. The memorandum was written in a book around Thanksgiving Day, 1945, a few days before she left for Florida. After writing in the book, Rose handed it to Erna Klinck and said that if something happened to her (Rose) Erna should give it to Gordon, who would take "the two boys in the office and read it to them." As translated, the memorandum was addressed to "Dear people" and reads as follows:

"I beg of you to see to it that Milton should receive 15 percent more than Jack, because Milton was pushed out, and after all Jack remained with a good business."

The statement concluded with the sentence: "I wanted to make another will but I am too weak to go to a lawyer; so I beg of you good people to help everyone." Plaintiff suggests

that when one considers that Rose was writing in Jewish rather than in English and that she was a person of limited education, it was apparent she meant the words "15 percent" to mean \$15,000. In the original document the "percent" was not written out but was indicated by a symbol similar to %. Plaintiff considers the writing positive evidence that Rose made a promise to Milton to create a \$15,000 trust fund for him, or otherwise to provide that he should receive \$15,000 at her death. Plaintiff also points out that Rose had ample funds with which to create a \$15,000 trust.

There is no contention that any fraud was committed in the transaction whereby Milton transferred his interest in the partnership to Jack. The evidence shows that an adequate consideration was paid to Milton. From a careful study of the transcript of the testimony and exhibits, we are satisfied that Milton did not enter into the agreement of August 7, 1945, in reliance on any verbal promise of Rose; that the making of the dissolution agreement by Milton was not induced by any promise of Rose to create a trust in his favor, or to provide by her will or otherwise that he would receive \$15,000 at the time of her death. We do not believe that Jack brought pressure to bear upon his mother to induce Milton to sell his interest in the partnership. Milton endeavored to have his mother set up a trust for him, but there is no evidence that she agreed to do so. The record does not show that Jack took advantage of the relationship of confidence and trust reposed in him by his mother to persuade her not to execute a declaration of trust or to establish a trust in favor of Milton at

her death. The writing signed by Rose does not say anything about having promised a \$15,000 trust fund or that she would leave him \$15,000 more than Jack in any will that she might make. The writing is precatory in nature. It does not definitely direct or state that the action she requests must be carried out. It is our view that the chancellor was right in dismissing the first cause of action for want of equity.

Joseph Willner, an attorney, was called as a witness by plaintiff. Plaintiff states that in cross-examining Willner counsel for defendant asked him to testify as to conferences with Milton and his attorney. Over the objection of plaintiff that the questions ~~did~~ not constitute proper cross-examination the witness was permitted to answer. Plaintiff says that witness thereupon testified to matters not within the scope of his direct examination, and that over objection he ~~was~~ permitted to testify concerning conversations between himself and Rose and between himself, Rose and Milton. Jack was called as a witness on his own behalf and testified to certain transactions between himself and Milton. Counsel for plaintiff then offered Milton as a witness to testify concerning the same transactions. The master sustained the defense's objection and refused to permit him to testify. An offer of proof was then made on behalf of plaintiff. The basis of the objection was that Milton was incompetent under Sec. 2 of the Evidence Act. (Sec. 2, Ch. 51, Ill. Rev. Stat. 1951.) Plaintiff contends that Milton was a competent witness after the testimony of Willner and Jack, under sub-sections 2 and 3 of Sec. 2, and that the ruling of the master, upheld by the chancellor, constituted reversible

(

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1934

[illegible]

100

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

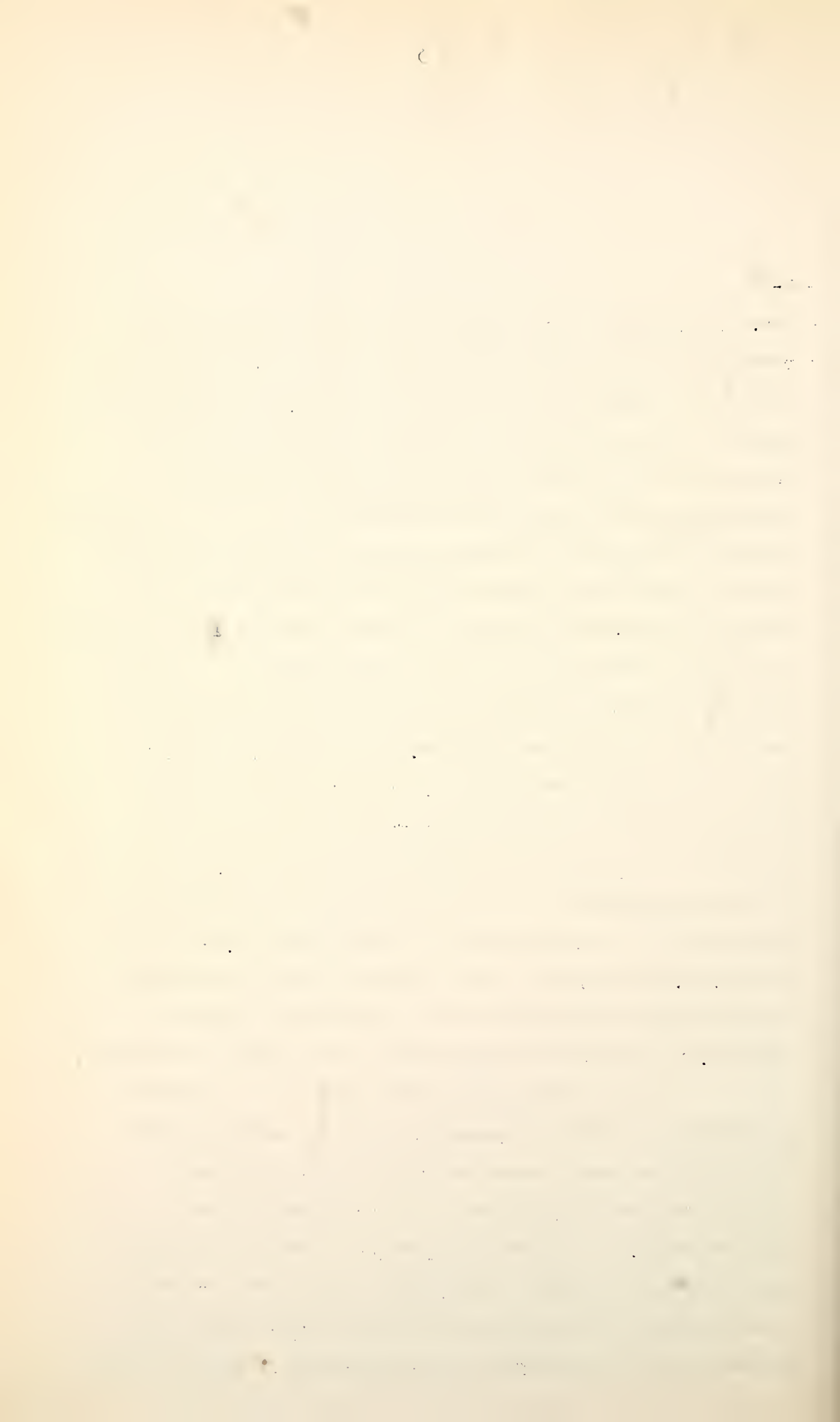
Journal of Management Education 30(6)p.789-804
© The Author(s) 2006. Reprints and permissions:
<http://www.sagepub.com/journalsPermissions.nav>

•

•

error. Plaintiff asserts that when Willner testified concerning matters not within the scope of his direct testimony, he became a witness for the defense and that Milton thereupon became a competent witness. We find that it was within the discretion of the master and the chancellor to allow the cross-examination because of the questions on direct examination. Plaintiff states that Jack was called as a witness regarding certain transactions between himself and Milton and that on the basis of Jack's testimony defendant's Exhibit I was received in evidence. There was no dispute that Exhibit I was signed and sent by Milton to Jack and the testimony of Jack that it was signed by Milton was surplusage. The third exception to Sec. 2 made Milton competent to deny the signature, but did not open the door to Milton to testify as to conversations with Rose and to other conversations or transactions. We are of the opinion that the master did not err in refusing to allow Milton to testify under the exceptions to Sec. 2 of the Evidence Act. Plaintiff states that the master erroneously admitted other incompetent evidence offered on behalf of defendants. We find that the rulings of the master were proper.

In discussing the second count of the complaint plaintiffs say that the chancellor erred in decreeing that the entire residuary estate he held in trust for Jack's children and depriving Milton and his children of any interest therein. Plaintiffs assert that the court should have construed the will to the effect that it was not Rose's intention that a dissolution of the partnership would cause Milton to lose the one-half of the residuary estate bequeathed



to him, but that it was her intention that his one-half be held in trust for him under Paragraph (b) of Article Six and that in the alternative that it was Rose's intention that the trust under Paragraph (a) was for the benefit of all Rose's grandchildren per stirpes, including Milton's children. The most important rule in the exposition of wills is that the intention of the testator expressed in the will shall prevail, provided it be consistent with the settled rules of law. All rules of construction yield to the intention of the testator plainly expressed. We are satisfied that the intention of Rose Troy expressed in Article Six of her will is clear and unambiguous. Under the first paragraph of the article she devised her residuary estate to Jack and Milton equally upon certain conditions. The condition fixed immediately thereafter is that at the time of her death her sons were still partners in the Chicago Pearl Button Company. The second paragraph of Article Six provides that in the event that at the time of her death her sons shall have dissolved their copartnership, the residuary bequest to them should be null and void and that her residuary estate should be paid to the Metropolitan Trust Company of Chicago, as trustee, to be held in trust for the benefit of Allen and Carroll Troy under certain conditions as thereafter specified. Having provided that in the event that Jack and Milton should not be partners at the time of her death, that the bequest should be null and void, Rose naturally desired to leave her property to some relative or relatives and she named her grandchildren, Allen and Carroll Troy. In doing so she took into consideration the fact that she might have other grandchildren,



such as the children of Milton, and fixed their interest by providing that "in the event both of my said grandchildren shall die before they reach the age of twenty-five, this bequest shall be paid to the children of Milton Troy, if any, share and share alike, when they shall reach the age of twenty-five years, and that if Milton should die without leaving lawful issue, then the bequest shall be paid to the Jewish Charities of Chicago." It is thus apparent that Rose considered the future children of Milton and deliberately left them out of her will except as to a contingent interest in the event Allen and Carroll should die before reaching the age of twenty-five years.

Paragraph (a) sets up a full and complete plan for the disposition of her property in the event that Jack and Milton had dissolved their partnership at the time of her death. Having set up this condition precedent as a bar to the vesting of title in her residuary estate in Jack and Milton, Rose provided for the disposition of her residuary estate in the event that the partnership had not been dissolved at the time of her death, and set up Paragraph (b), which provides how her residuary estate should be handled in that event. We do not agree with the finding in the decree that the will is ambiguous. In our opinion the chancellor properly rejected the construction of the will sought by plaintiffs.

The decree did not make any specific finding as to whether the provisions for accumulation of income beyond the minorities of the grandchildren violates the

-14-

statute against accumulations. We do not know whether the chancellor was asked to make any ruling on this proposition. As plaintiffs failed to establish any ground for relief, we do not deem it necessary to discuss this point.

For the reasons stated, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

NIEMEYER, J., and FRIEND, J., Concur.

75

45301

PEOPLE OF THE STATE OF ILLINOIS,
ex. rel. ZADA T. TEMPLETON, MERYL
HABERMAN, MAUREEN LANG and
JEANNETTE EPPLEY,

Appellants,

v.

THE BOARD OF EDUCATION OF TOWNSHIP
HIGH SCHOOL DISTRICT NO. 201, COOK
COUNTY, ILLINOIS, OTTO PECHA, CHARLES
MATT, GEORGE PROSCH, JOSEPH F. MRIZEK
and E. W. CHODL, Members of said Board
of Education,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

345 I.A. 295¹

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Zada T. Templeton, Meryl Haberman, Maureen Lang and Jeannette Eppley filed an amended complaint in the Superior Court of Cook County against the Board of Education of Township High School District No. 201, and the members of the Board of Education thereof, charging that they were illegally discharged from their positions as teachers in the J. Sterling Morton High School, Cicero. They asked for a writ of mandamus commanding their reinstatement. A motion to strike the complaint was overruled and defendants answered. Relators' motion to strike defendants' amended answer was denied. They elected to stand on their motion and judgment was entered for defendants. Relators, appealing, ask that the judgment be reversed and that the cause be remanded with directions to enter judgment commanding their reinstatement. Grace Blixt Nyvall was dismissed from the case. Subsequent to the filing of the appeal Zada T. Templeton died. As to her the mandamus action has abated.

1867

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

Received of the Hon. Secy of the Navy
the sum of \$1000.00 for the purchase of
the ship "Albatross" for the service of the
U. S. Navy.

As the case was disposed of on the pleadings, the facts are not in dispute. Relators were married during their employment as teachers. On March 29, 1946, the superintendent of schools sent a letter to each of them, stating that the Board had voted to "keep to its original policy that women who become married may serve two years after their marriage and then retire." The letter further stated that during the war "this rule was held in abeyance, but it is hereby reinstated; and so in accordance with the board's instructions you will not be offered a contract to teach at Morton for the next school year." On April 6, 1946, relators made a written request for a hearing. On June 10, 1946, after the close of the school term, they served on the Board a demand in writing that the purported notices of dismissal be withdrawn, that they be given official notice of such withdrawal and that they be notified that they would be permitted to continue their services as teachers. The notice was ignored by defendants. As early as April 21, 1936, the Board discussed a policy barring married women as teachers and decided that "new women applicants who are married are not to be employed, but that a normal leniency be shown to those now employed not to exceed two years after the current year." On December 16, 1938, the policy was discussed by the Board and left unchanged. On March 29, 1943, the Board voted "to hold the rule limiting the tenure of married teachers to two years in abeyance for the duration [of the war] provided that their services were needed and satisfactory, and that it would be necessary to employ a teacher to take their place if they

left or were dismissed." On June 26, 1945, the policy was again discussed and left in force. The Board, however, "decided to serve notice that at the close of the war the policy of retaining married women only two years after marriage will be enforced."

On March 28, 1946, a special session of the Board was called to hear the married women teachers who had "requested through the superintendent the privilege of meeting with the Board and explaining their particular case." The proceedings of the Board recite that a number of teachers, including the relators, were present and were asked to state their case; that they gave reasons why she should be allowed to continue on the faculty; and that after the discussion the teachers left and the Board "again reiterated the policy in regard to married teachers" and instructed the superintendent to send letters of notification to relators.

The Board of Education had the power to pass a rule against the retention of married women teachers and the enactment and enforcement of such rule did not violate the Teachers Tenure Law. Christner v. Hamilton, 324 Ill. App. 612; McGuire v. Etherton, 324 Ill. App. 161. The rule against the employment or retention of married women teachers did not violate the statutory provisions relating to married women's capacity to contract or the public policy of this state.

Relators assert that they were not given the hearing to which they were entitled under the Teachers Tenure Law (Par. 24-3, Ch. 122, Ill. Rev. Stat. 1951). In their prayer they do not ask for a writ to compel defendants to



grant them a hearing. They pray for a writ commanding their restoration to duty. Relators, by their motion to strike, admitted the existence of the rule of the Board against the employment or retention of married women teachers. They also admit they were married. They were retained for periods subsequent to their marriage. Under the facts no useful purpose could be served by reinstating the relators for the purpose of according them a hearing that would be an empty formality. The contracts for the last year of the probationary employment contain the provision that the teacher agreed to perform her duty subject to the direction of the superintendent in accordance with the rules and regulations governing the school, and subject to all of the provisions and limitations of the Illinois State tenure law. When relators acquired tenure status their contracts were continued in effect subject to the provisions of the Act and the lawful regulations of the Board. They knew of the rule against the employment or retention of married women teachers from the time of its adoption. The contractual continued service status of relators continued the contract provisions in force. The termination of their contracts was pursuant to the provisions of the contract. It is fundamental that a writ of mandamus will not issue unless the relator shows a clear legal right to the writ. A party cannot be compelled to perform an act by mandamus unless it is made to affirmatively appear that it is his clear duty to do so. The party who seeks to compel the performance of an act must set forth every material fact necessary to show that it is the plain duty of the one against

whom the writ is sought to act in the premises, before the courts will interfere. Bengson v. City of Kewanee, 380 Ill. 244; People v. Allman, 382 Ill. 156; People v. Board of Review of Lake County, 363 Ill. 106. Relators have failed to show a clear legal right to the writ they seek. Therefore, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., AND NIEMEYER, J., Concur.

45446

CEMENT GUN CO., INC., a corporation,
Appellee,

v.

PATRICK WARREN CONSTRUCTION CO.,
a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

345 I.A. 295²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended statement of claim filed in the Municipal Court of Chicago by the Cement Gun Co., Inc., against the Patrick Warren Construction Co., Inc., plaintiff alleges that it and defendant entered into a written contract on January 7, 1946; that the contract was modified on December 18, 1946; that plaintiff performed all of the work required to be done by it under the contract and the modifications thereof; that defendant became indebted to plaintiff in the amount of \$100,656; that defendant paid to plaintiff in installments \$86,089.66; that after giving defendant all credits there was due plaintiff \$14,566.34, plus \$2,093.66 as interest for vexatious delay; and it asked judgment against defendant for \$16,660. The contract and modifications were made a part of the amended statement of claim.

Under the contract plaintiff, as a subcontractor, agreed to furnish defendant, the contractor, all labor, material and equipment necessary to complete all work called for "under Gunitite Work, pages 10-34 and 10-35 of Assembly Building Specifications," for the Office and Assembly Building of the Ford Motor Company in St. Louis,

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

1911. 12. 16

Missouri. Defendant agreed to pay plaintiff for the performance of the contract the sum of \$90,000. The proposal of plaintiff, which became a part of the contract, contained the following clause:

"Freezing Weather: The price quoted herein does not contemplate doing any portion of this work during freezing weather. If any work is performed during freezing weather you shall provide free of cost to us all labor, materials and other facilities in connection with the heating and protection of the work and materials. You shall also reimburse us for the additional cost of winter operations. We reserve the right to suspend work during freezing or unfavorable weather conditions without penalty."

The modification made December 18, 1946, in the form of a letter by plaintiff to defendant, and accepted on its face by defendant, states that "in consideration for continuing 'Gunitite' work on the above job through the winter, our contract price shall be increased in the amount of Ten Thousand Dollars (\$10,000.00) to cover additional costs of winter operation." In an amended "defence" defendant alleged that there was no consideration paid or suffered by plaintiff for any additional compensation; that there was no detriment suffered by plaintiff or benefit received by defendant beyond or in addition to the promise contained in the original contract; that in the alternative there was no delivery of the letter of December 18, 1946, on which plaintiff relies for the additional \$10,000 claimed; that the letter never became or constituted a contract between the parties; that simultaneously with and at the time of the signing and conditional delivery by the defendant to plaintiff of the letter of December 18, 1946, defendant delivered to the plaintiff through R. N.

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

100

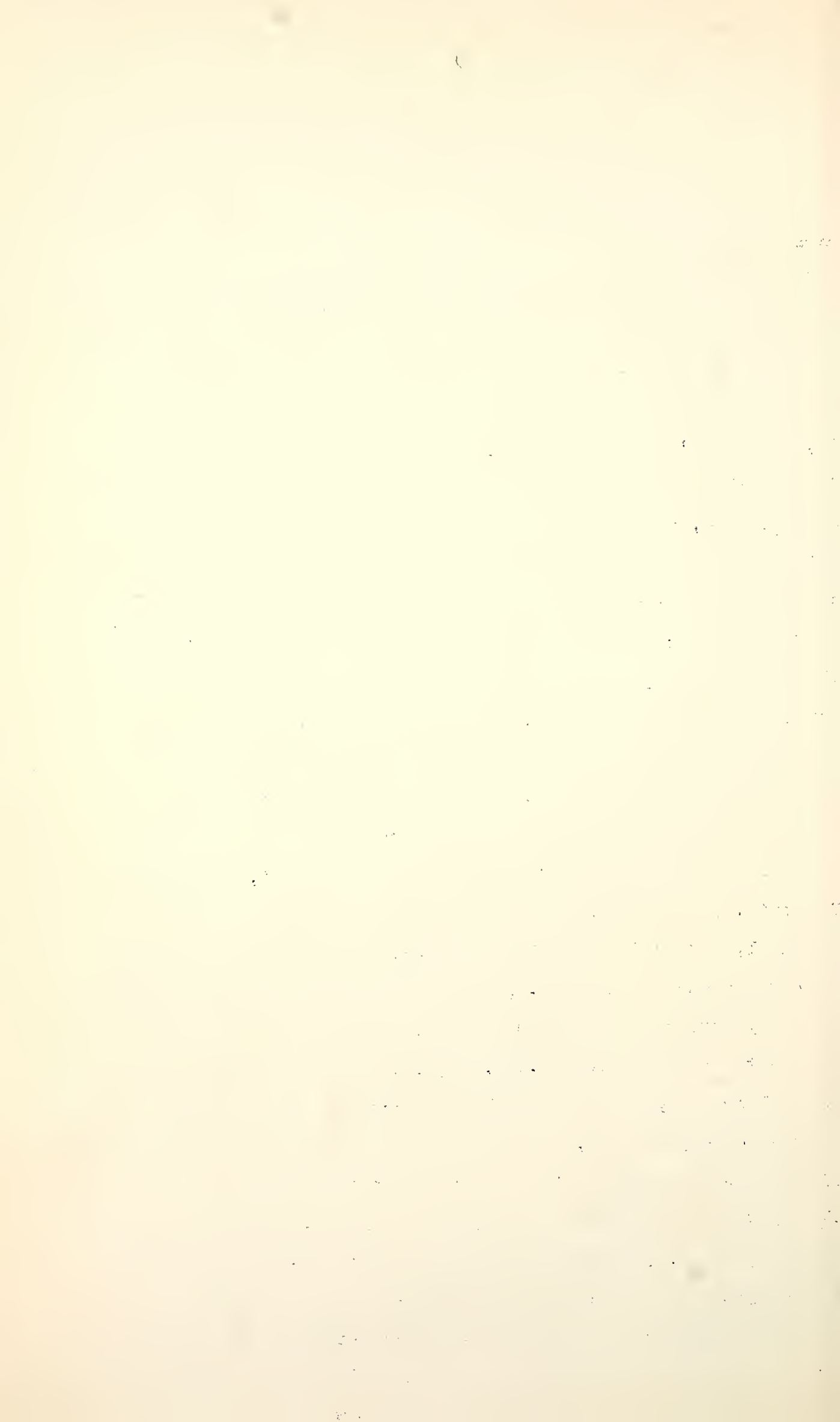
100

100

100

100

Gillespie, plaintiff's agent and chief engineer, a further signed letter relating to the identical subject matter, which letter, letter, a copy of which defendant attached to its pleading, together with the letter of December 18, 1946, constituted the only contract of the parties "referred to in both of said letters"; that the letter attached to the "defence" as Exhibit 1, "expressly conditioned the performance by defendant of any promise by defendant in the letter of December 18, 1946," in that additional payment of \$10,000 was to be made by defendant to plaintiff only in the event defendant recovered that amount from Ford Motor Company; that "defendant, [plaintiff] through and by its said agent, R. N. Gillespie, in its behalf agreed before and at the time of the physical, but conditional delivery of said letter attached to the amended complaint, that said letter would not be or constitute a contract between the parties unless and until defendant was paid said \$10,000.00 by Ford Motor Company, and that legal or effective delivery by defendant to plaintiff of said letter of December 18, 1946, would not occur or take place unless and until such additional payment was made by Ford Motor Company to the defendant, and plaintiff further then and there agreed, by and through its said agent, that plaintiff would hold in its files said letter of December 18, 1946, * * * upon condition that it would not be legally or effectively delivered or constitute a contract between plaintiff and defendant unless and until defendant was paid said \$10,000.00 by Ford Motor Company; that plaintiff, through and by its said agent, further agreed before and at



-4-

the time of signing of said letter of December 18, 1946, * * * that if and when defendant notified plaintiff that it was unable to obtain said \$10,000.00 payment from Ford Motor Company, then and in that event plaintiff would return or destroy said letter of December 18, 1946, * * * and said letter would then and thereupon be null and void and would not become a contract between the parties; and that defendant never did receive said \$10,000.00 from Ford Motor Company, although it made diligent and reasonable efforts to obtain payment."

Defendant alleged in the alternative that at the time of the physical delivery of the letter of December 18, 1946, plaintiff "by said agent then and there agreed and promised to sign and deliver to defendant a replica or duplicate original of the letter of December 18, 1946, attached hereto and marked Exhibit 1, and by its said agent further promised and agreed that the letter of December 18, 1946, * * * would not become or constitute a contract between the parties unless and until said replica or duplicate of the said letter, * * * was executed and delivered by plaintiff to defendant; that plaintiff never executed or delivered such a letter but despite frequent requests failed to execute and deliver such letter, but continuously orally promised to execute and deliver a copy or duplicate of said letter, and surreptitiously withheld said letter in its files, with the apparent intent to fraudulently seek payment of said \$10,000.00 from defendant, regardless of whether

defendant obtained said \$10,000.00 from Ford Motor Company or not, in violation of the agreement of the parties; and that therefore the letter attached to the amended complaint never became or constituted a contract between the parties and never was delivered by defendant to plaintiff so as to create a contract." Defendant further alleged that plaintiff completed the work required of it "but performed such work in an unworkmanlike manner and caused great expense to defendant"; that plaintiff applied "Gunitite" to improper places and negligently and carelessly sprayed "Gunitite" over supporting beams, columns and structural steel, contrary to the contract of the parties and contrary to the use and custom in the trade, all of which necessitated removal and cleaning thereof by defendant before the same could be painted as required, whereby defendant was damaged to the extent of \$4,500; that the \$86,089.66 paid to plaintiff was in full satisfaction of all work performed by plaintiff; and that defendant did not owe plaintiff anything. Defendant's Exhibit 1, attached to the "defence" is a copy of a letter dated December 18, 1946, addressed to plaintiff and signed by defendant, which reads:

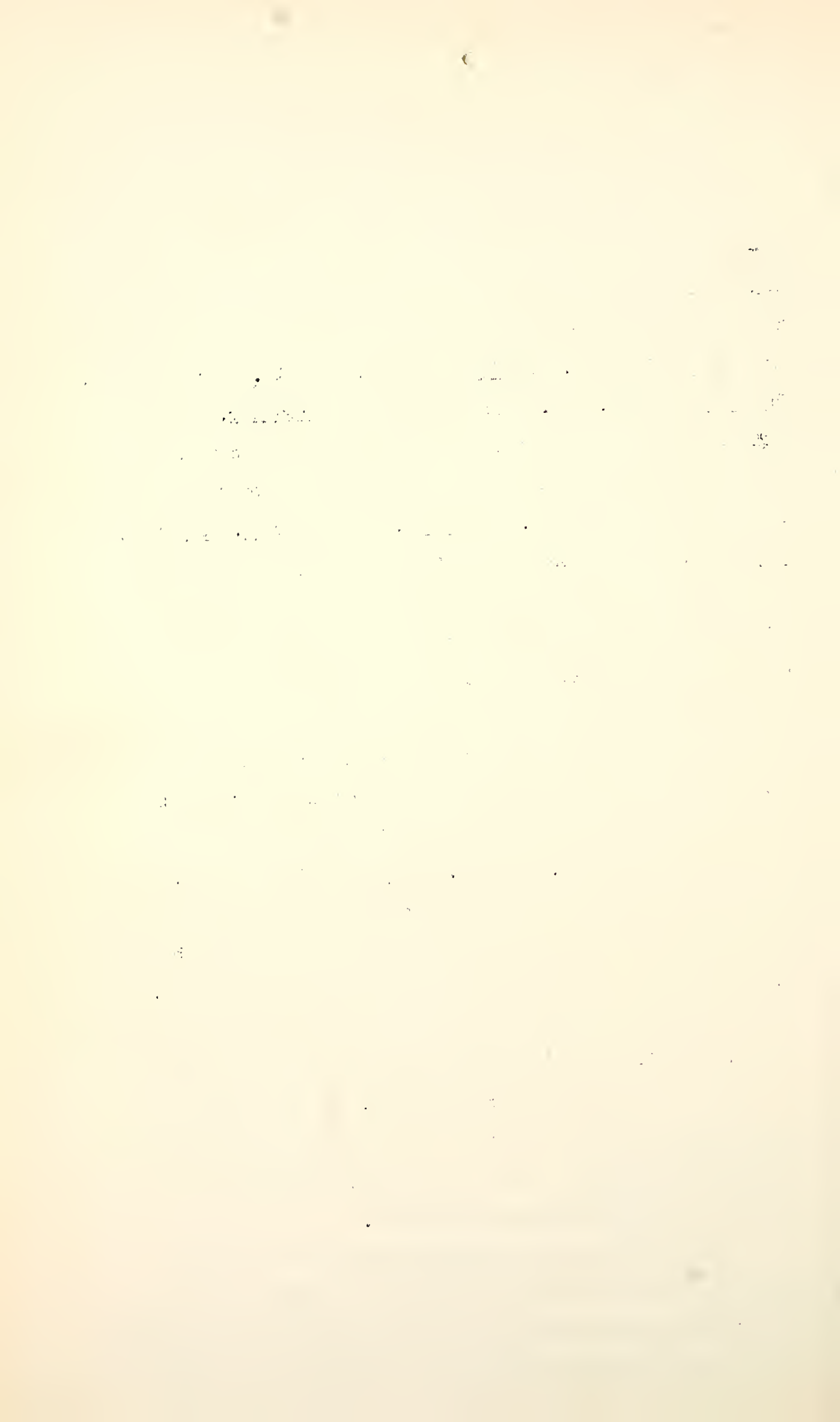
"In connection with our letter to you of even date regarding winter work on the above project and payment of an additional \$10,000.00 to you, this letter will confirm our understanding that this \$10,000.00 shall be due and payable to you only when and if received from the Ford Motor Company by the Patrick Warren Construction Company."

Plaintiff's motion to strike defendant's second amended "defence" and for judgment was sustained and judgment was entered against defendant for \$16,660. Defendant appeals.

Defendant maintains that its pleading tendered an issue of fact as to whether the first letter (of December

18, 1946) was delivered so as to make a contract between the parties. The necessity of delivery of a written contract is well established. Jordan v. Davis, 108 Ill. 336; Curtis v. Harrison, 36 Ill. App. 287; Biederman v. O'Connor, 117 Ill. 493. Delivery is a question of intent and depends upon whether the parties at the time mean an instrument is to take effect as a contract presently. Jordan v. Davis, supra.; Sugar v. Marinello, 260 Ill. App. 85. While an instrument absolute on its face cannot be shown by parol to be conditional, evidence that the instrument was not intended to take effect as a valid obligation until the occurrence of some future contingency is admissible between the original parties and between them and those taking with notice, as such evidence does not contradict the terms of the writing or vary its legal import but tends to show that it was never delivered as a present contract. Bell v. McDonald, 308 Ill. 329. It will be noted that in the case at bar defendant has pleaded that it was the intention of the parties that before any contract relating to additional payment should exist, two instruments were to be executed and reciprocally delivered, namely, the first letter which required defendant to pay an additional \$10,000.00 to plaintiff, and the second letter which provided that the \$10,000 was to be paid by defendant to plaintiff only in the event defendant was paid that amount by Ford Motor Company.

The parties are in agreement that parol evidence may not be offered to add to, vary or contradict the terms of a written instrument and that all negotiations antecedent thereto or simultaneous therewith are deemed to be merged



therein. Plaintiff states that parol evidence is competent for the purpose of showing that a written instrument was never legally delivered, but urges that such evidence is incompetent to show that a written instrument legally delivered was not to become operative before the performance of some condition, and that where a written instrument is complete on its face, it cannot be delivered to the obligee as an escrow, to take effect upon a condition not appearing upon the face of such instrument. Ryan v. Cooke, 172 Ill. 302; Riley v. International Banana Food Co., 185 Ill. App. 629; Logue v. Von Almen, 379 Ill. 208; Stromsen v. Stromsen, 397 Ill. 260; McCann v. Atherton, 106 Ill. 31; Stevenson v. Crapnell, 114 Ill. 19. Defendant did not plead that the contract sued upon was delivered as a contract subject only to a separate parol agreement which conditioned its performance. It pleaded that the letter of December 18, 1946, never became or constituted a contract between the parties. By its pleading the defendant does not contradict the terms of the letter of December 18, 1946, but says that it was never delivered as a present contract. The authorities are in accord that the question of delivery is one of fact, determinable by ascertaining the intention of the parties at the time of the physical passing of an instrument.

The pleading of alternative defenses of which plaintiff complains is permitted by Rule 38 of the Municipal Court of Chicago and Sec. 43 (2) of the Civil Practice Act, Par. 167. Sec. 43 (2), Ill. Rev. Stat. 1951. Rule 38 says that when a party is in doubt as to which of two or more statements of fact is true, he may state them in the alternative,

or when they appear in different defenses he may state the defenses in the alternative, and that a bad alternative shall not affect a good one. We do not find any fault with the alternative pleading of the defendant. Defendant asserts that the application of common sense to the transaction establishes the truth of the defense, and that it, as a general contractor working on a lump sum contract, does not enter into contracts with subcontractors who are also working for a lump sum, providing for substantial additional payment to the subcontractor, unless it is to be reimbursed by the owner, and that plaintiff as a subcontractor was aware of this. Plaintiff, inquiring how a general contractor could demand an increase in the amount to be paid by the owner because of additional or unanticipated expenses, states that under the facts defendant could not demand an increase from the owner. Plaintiff asks what would defendant consider plaintiff's rights to be under the modification agreement had the Ford Motor Company given defendant \$1,000 or \$9,000 or any sum other than \$10,000. Plaintiff says that it is well known that businessmen attempt to put their entire understandings into one document, and that defendant has not pleaded any facts why the contents of the exhibit to its pleading were not included in the modification agreement or indorsed on the margin thereof. Plaintiff further inquires why it, having the right to suspend work in unfavorable weather without penalty, should have contracted that right away for a nebulous or uncertain promise of payment by defendant.

These arguments go into the realm of speculation or to the motives of the controlling agents of the respective corporations, and should be directed to the trial judge or a jury in the trial of the case. They cannot be considered in determining whether the court erred in striking the "defence."

A further defense presented is that the supplemental contract of December 18, 1946, lacked consideration. This defense is without merit. Plaintiff had the right to suspend work during freezing or unfavorable weather conditions without penalty. The letter recites that the consideration to defendant was the continuous performance by plaintiff of the "Gunitite" work through the winter for an additional consideration of \$10,000. The court did not err in striking this defense.

In its amended statement of claim plaintiff alleged that it performed all of the work required to be done by it under the original contract and the modification. Defendant pleaded that plaintiff completed the work required of it but "performed such work in an unworkmanlike manner and caused great expense to defendant"; that plaintiff "in applying 'Gunitite' applied it to improper places and negligently and carelessly sprayed 'Gunitite' over supporting beams, columns and structural steel, contrary to the contract of the parties and contrary to the use and custom in the trade, all of which necessitated removal and cleaning thereof by defendant before the same could be painted as required," to the damage of defendant in the sum of \$4,500. Plaintiff's written motion states that this defense should

-10-

be stricken for the reason that defendant fails to allege any duty on the part of plaintiff to refrain from spraying 'Gunitite' over supporting beams, columns and structural steel. Plaintiff did not ask that the defense be more specific. This paragraph of the defense presented an issue as to whether plaintiff performed its contract in a workmanlike manner and as to defendant's right to deduct \$4,500 from the contract price. We are of the opinion that the court erred in striking this paragraph of the defense. Another paragraph of the defense states that the payments made were in full satisfaction of all work performed. As defendant does not argue this point, we assume it has been abandoned.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to proceed in a manner not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and NIEMEYER, J., Concur.



45424

JAMES J. ROY,
Appellee,

v.

CHICAGO MOTOR COACH COMPANY,
a corporation,
Appellant,

C. DOUQUET and JOSEPH ARLOTTA,
Defendants.

APPEAL FROM

CIRCUIT COURT OF

COOK COUNTY

345 I.A. 296

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, James J. Roy, brought suit against Chicago Motor Coach Company (hereinafter referred to as the defendant), and C. Douquet and Joseph Arlotta (hereinafter referred to as the codefendants) for personal injuries sustained by him as a passenger in the taxicab owned by Douquet and driven by Arlotta, when it collided with defendant's bus. The jury returned a verdict in favor of plaintiff, assessing his damages in the sum of \$35,000.00 against defendant alone. The codefendants Douquet and Arlotta were found not guilty. The defendant, Chicago Motor Coach Company, alone, appeals from the judgment.

Plaintiff, 52 years of age at the time of the accident, was a furniture salesman residing in Minneapolis, Minnesota. January 16, 1947, he was in Chicago to attend a furniture convention held at the Furniture Mart and, with his wife, was staying at the Maryland Hotel on Rush street and Delaware place. About nine o'clock of the morning in question he left the hotel, took codefendants'

-2-

taxicab and directed the driver to go to the Furniture Mart. The cab made a left turn after leaving the hotel and proceeded in an easterly direction on Delaware place at a speed, as the driver testified, of between fifteen to eighteen miles per hour. Cars were parked along the south curb of Delaware place which is an east-and-west street, and at a point approximately half a block east of Dewitt place, a north-and-south street, the driver stopped behind two cars parked double on the south side of Delaware place to yield the right-of-way to a car coming in the opposite direction. After he passed the parked cars he returned to the right-hand side of the street, and as he reached the building line of Dewitt place he looked north but saw no other vehicle. He first observed the motor coach when it was "even with the north building line," at which time his cab was "at the west crosswalk." On seeing the coach approaching the intersection he applied his brakes, and at the same time the bus swerved, the taxicab slid on the icy pavement, and the vehicles collided in the southwest quarter of the intersection. After the impact the bus "went up over the southeast curb" before it stopped.

Roy testified that after leaving the Maryland Hotel the taxicab reached Delaware place and was proceeding on that street in an easterly direction at a speed between fifteen to eighteen miles per hour; that cars were parked along the south curb of the street, and at a point about 60 feet west of Dewitt place the taxi driver turned out and slowed down to pass two cars which were double parked;



-3-

that he then drove west on the right side of the street at approximately the same speed; that when the taxicab was about ten feet west of the intersection (meaning, as he stated, the center line of the intersection) he first observed the bus about 20 feet north of the building line traveling in a southerly direction on Dewitt place at a speed which he estimated at between 25 to 30 miles an hour; that neither vehicle stopped until they collided near the center of the intersection.

Andrew Kosik, driver of the motor coach, testified on behalf of defendant, that he was operating a one-man bus, serving in the dual capacity of both driver and fare collector; that at the intersection of Walton and Dewitt place he picked up a passenger and then turned right into Dewitt place; that there were no cars parked along the west curb of that street, and he proceeded south about two feet from the right-hand curb, at no time attaining a speed in excess of 15 miles per hour; that at a point about a half block north of Delaware place he started to slow down for the crossing and reduced his speed to approximately eight miles an hour; that on reaching the building line he looked in both directions and "couldn't see anything coming," although he had a clear view of Delaware place for 100 feet west of the intersection; that when he got ten feet into the intersection he could see all the way to the next corner; that when he looked the second time he had already crossed the center line of Delaware place and he saw "a cab about eight to ten feet away" from him; that

the front of the cab collided with the front right wheel of the bus, the impact pushing the bus across the southeast corner of the sidewalk.

All the witnesses testified that the streets were wet and icy in spots and that there was some snow underfoot. As a result of the impact plaintiff was thrown from his seat in the taxicab and severely injured.

As ground for reversal it is first urged that the verdict of the jury was against the manifest weight of the evidence, and could have resulted only from passion, prejudice or improper motives on the part of the jury. We have already stated in summary the principal testimony of the witnesses to the accident. The physical facts testified to by the several witnesses are sharply conflicting. If the testimony of the driver of the bus is taken as true, it would have been impossible for this accident to have occurred because if he looked and could see 100 feet to his west along Delaware place when he reached the building line of that street the approaching taxicab would have come within the range of his vision. Under the clearly settled law in this state, if a person looks but does not see what is plainly visible, he is negligent. Bushu v. Cordera, 257 Ill. App. 234; De Bow v. Cleveland, C., C., & St. L. Ry. Co., 245 Ill. App. 158; Koenig v. Semrau, 197 Ill. App. 624. The evidence submitted in behalf of the defendant and the codefendants cannot be reconciled, and a court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions,

or because the court regards another result as more reasonable. Jefferson Ice Co. v. Industrial Com., 404 Ill. 290; Tenant v. Peoria & P. U. Ry. Co., 321 U. S. 29. Under such circumstances, where the evidence is conflicting, the jury must reconcile it, if possible, and, if not, determine where the truth lies; and having seen and heard the witnesses, they have a right to give credence to one or more of them, and to discredit the others. Goldstein v. Muller, 189 Ill. App. 145; Economy Furniture Co. v. Chapman, 54 Ill. App. 122; Fisher v. Phillips, 19 Ill. App. 650. The allowance or refusal of a new trial on the weight of the evidence is addressed to the sound discretion of the court, and on the question of the weight of the evidence such discretion is not reversible unless the record shows a clear abuse thereof. Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402. As we read the record and upon the evidence presented, the testimony of the driver of the motor coach that he had a clear view for 100 feet to the west but did not see the cab, indicates that he was negligent, and it was within the province of the jury to find that his negligence was the proximate cause of the injury. It must be conceded that plaintiff made out a prima facie case against both defendant and codefendants. Upon trial they entered into a controversy, each seeking to place the responsibility upon the other by attempting to show that the other was negligent and that such negligence was the sole proximate cause of the injury to plaintiff. This raised issues between them, presenting to the jury a question of fact as to whether

one or the other was guilty of negligence proximately causing the accident.

As further ground for reversal it is urged by defendant that the court erred in instructing the jury. Instruction No. 13, tendered by codefendants, is criticized on several grounds as having been particularly misleading and prejudicial. This instruction was predicated on the Uniform Traffic Act (Ill. Rev. Stat. 1947, ch. 95 1/2, par. 165). It is said that the first paragraph of this charge to the jury purporting to instruct them in the language of the statute was clearly erroneous because it omitted the elements of speed and the relative position of the cars approaching the intersection. The second paragraph of the instruction supplied these elements. Moreover, predicated upon the same statute, defendant tendered and the court gave instruction No. 24 which stated the correct rule of law in the following language: "The jury is instructed that while the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left the statute manifestly does not intend to confer that right regardless of the speed and distance the approaching vehicles may be from the point of intersection. It does not contemplate that the right of way be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed the latter will reach the line of crossing before the former will reach the intersection. If you further believe from all of the evidence and under the



instructions of the court that the taxicab in this case was not entitled to assert any claim of right of way under the statute mentioned and as a sole result and without any negligence on the part of the defendant, Chicago Motor Coach Company, thereby proximately caused and brought about the occurrence in question then you should find the defendant, Chicago Motor Coach Company, not guilty." There is no inconsistency between the second paragraph of instruction 13 and instruction 24. By instruction No. 1 the court specifically advised the jury that the instructions constituted one connected body and series and should be so regarded and treated by the jury, and that they should apply them to the facts, as a whole, and not detach or separate any one instruction from the others.

Instruction No. 13 is further criticized because of the use of the phrase "due care" and its failure to differentiate between the degree of care owed plaintiff, respectively, by the motor coach company and the owner and operator of the taxicab. "Due care" as used in this instruction does not purport to define the duty of either party to the plaintiff. Although codefendants were required to use the highest degree of care possible in their relationship with the plaintiff, as charged in instruction No. 7, the motor coach company was required to use only ordinary care toward the plaintiff, as charged in instruction No. 6; thus the distinction as to the different degrees of care owed plaintiff by the defendant and codefendants was clearly pointed up in these two instructions, and as a consequence defendant could not have been prejudiced by the "due care" phrase as used in instruction No. 13. Further criticism of the instruction is made on the ground that it states an

incorrect rule of law as to what constitutes a "reasonable rate of speed." The speed of the respective vehicles was not in issue except insofar as it might be a factor in determining the right of way of one vehicle over the other. No instruction was given as to speed in connection with the Vehicle Act as to either party, except that in instruction No. 24, offered by defendant and given by the court, the phrase "within the recognized limits of speed" is used, and was undoubtedly understood by the jurors because of their common experience with automobiles.

Complaint is made of instructions No. 10 and No. 12, tendered on behalf of codefendants, for the reason that these instructions refer to the codefendant C. Douquet as Roy Douquet. Such designation was nothing more than a typographical error and could not have confused the jury. Instruction No. 12 is also criticized because it purports to advise the jury that the cab driver was not an insurer of the absolute safety of the passenger. We think the instruction states the law for, unless some negligence is shown on the part of the driver of the cab, there can be no liability, and the instruction advised the jury that the cab driver was required to "use the highest degree of care consistent with the mode of conveyance," which is fundamentally correct. Defendant also objects to the substance of instruction No. 10, but it dealt with negligence as the sole proximate cause of the accident, and could not have prejudiced defendant in view of its instruction No. 21 which stated that if the occurrence was proximately caused

solely and wholly because of the negligence of the codefendants, then no liability was incurred, and it became the duty of the jury to return a verdict of not guilty as to the motor coach company.

Criticism is also made of plaintiff's instructions No. 2, No. 8 and No. 9. In the first of these the jury were told that in passing on the verdict they were not required to set aside their own common observation and experience as men and women in the affairs of life, but could take into consideration all the evidence in the case in the light of their ^{own} common observation and experience, to say where the truth lay in any material fact in the case. Defendant objects to the phrase "any material fact" because it is not defined in the instruction. Under such an instruction the jury have the right to review all the facts in the light of their common experience (Kankakee Park District v. Heidenreich, 328 Ill. 198; Steinberg v. Northern Illinois Telephone Co., 260 Ill. App. 538), and the word "material" used in the instruction is therefore without significance.

There is no merit to the criticism made of either instruction No. 8 or No. 9. We have examined both of them and, taken in connection with other instructions given, they express correct rules of law.

The remaining question relates to the amount of damages, which defendant seeks to minimize. The record discloses that plaintiff was in good health before the accident. He worked on a commission basis and his earnings for the year previous to the collision were \$12,000.00. As a result of the injuries he was completely disabled for a

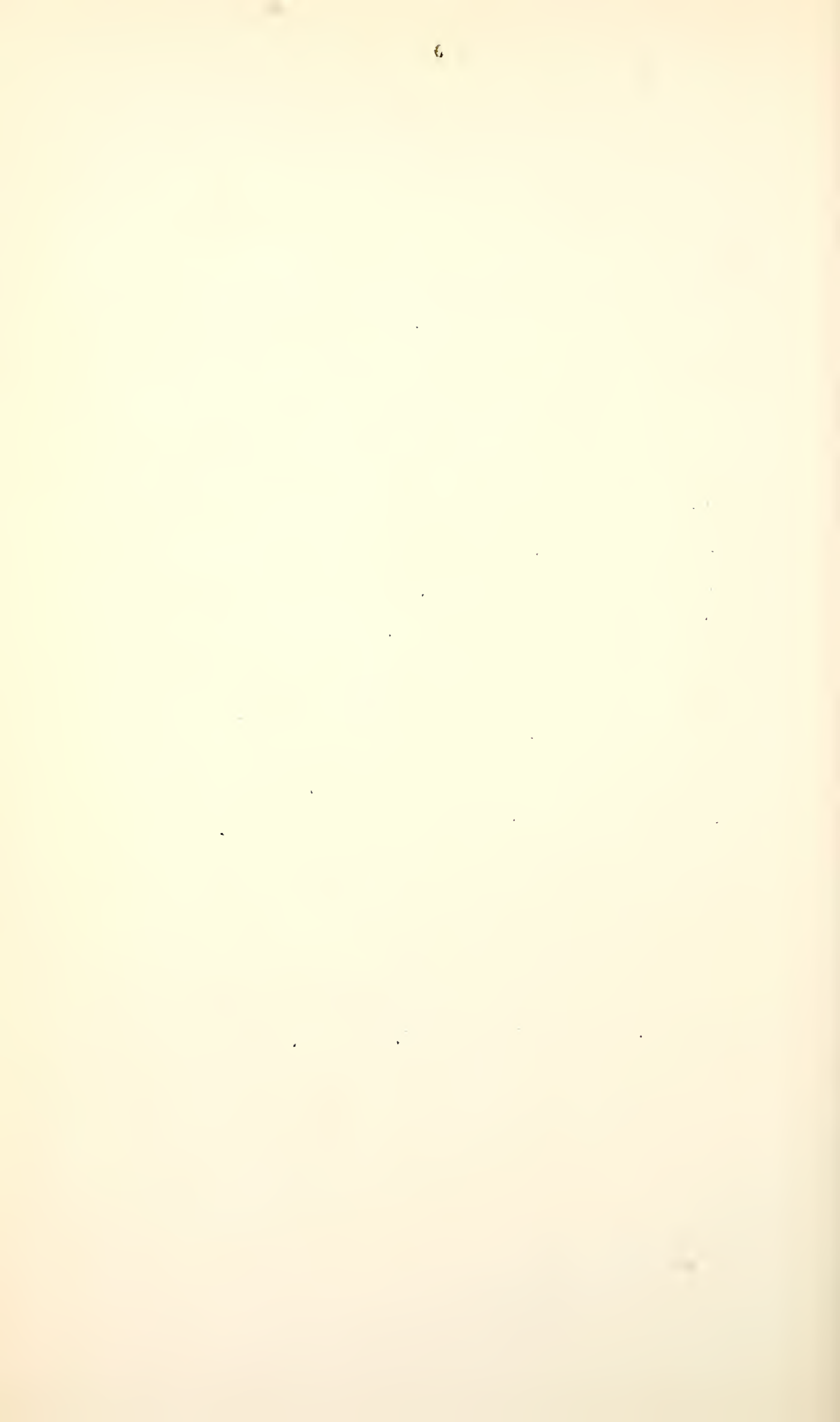
-10-

period of six and one-half months which occasioned a loss in earnings of about \$6500.00 on a loss-of-time basis. He suffered severe pain, had two serious operations, now walks with a limp and experiences a constant numbness in the knee as the result of the serious comminuted fracture of the right patella or kneecap which he sustained. X-ray pictures showed that two fingers could be placed between the broken fragments, and that the bone was crushed or broken into ten or fifteen pieces, enlarging the kneecap because of hemorrhages into the joint. There is evidence that the injuries were permanent, leaving approximately a 60 per cent loss of motion in his knee and ^{an}atrophy of the thigh and calf. Upon the whole we think the verdict fairly reflected the injuries, loss of time, pain and suffering of plaintiff, and was therefore not excessive.

The case was fairly tried and, for the reasons indicated, the judgment of the Circuit Court should be affirmed; it is so ordered.

JUDGMENT AFFIRMED.

BURKE, P. J., and NIEMEYER, J., Concur.



78

A

45331

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. PATRICK GILHOOLY,

Appellee,

v.

JOHN C. PRENDERGAST, as Commissioner
of Police of the City of Chicago,
STEPHEN E. HURLEY, CHARLES A. LAHEY
and ALBERT W. WILLIAMS, as Civil
Service Commissioners of the City of
Chicago, MARTIN H. KENNELLY, as Mayor
of the City of Chicago, JOSEPH T.
BARAN, as Treasurer of the City of
Chicago, JAMES H. DILLARD, as Com-
ptroller of the City of Chicago,
LUDWIG D. SCHREIBER, as Clerk of the
City of Chicago, and CITY OF CHICAGO,
a Municipal Corporation,

Appellants.

345 I.A. 297

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

With the exception of the relator on whose behalf the action is instituted, the parties in this case are identical with those in People ex rel. Foley v. Prendergast, et al., No. 45330, in which an opinion is being filed concurrently with this opinion. The order appealed from is identical in form with that entered in the Foley case. The orders differ only as to the name of the plaintiff, or relator, and the findings as to Gilhooly's relative standing on the eligible list for promotion to sergeant. In this case plaintiff alleges and defendants admit that "plaintiff's original standing on said Sergeant's list was #627 and his original grade was 74.03; that when the list was revised to allow for military credits for those persons who served in World War I, plaintiff's standing was then #710; that plaintiff's standing at the present time is #91."

-2-

This case is governed by the decision in People ex rel. Foley v. Prendergast, supra. It is apparent that plaintiff is not eligible for certification for appointment if notices were given for filling the vacancies in the rank of sergeant found in the order. He has failed to show a clear legal right to the relief sought.

The judgment is reversed and the complaint dismissed at plaintiff's cost.

REVERSED AND COMPLAINT DISMISSED
AT PLAINTIFF'S COST.

BURKE, P.J., AND FRIEND, J., CONCUR.

45333

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. HARRY A. RULO,
Appellee,

v.

JOHN C. PRENDERGAST, as Commis-
sioner of Police of the City of
Chicago, STEPHEN E. HURLEY,
CHARLES A. LAHEY and ALBERT W.
WILLIAMS, as Civil Service Com-
missioners of the City of Chicago,
MARTIN H. KENNELLY, as Mayor of the
City of Chicago, JOSEPH T. BARAN,
as Treasurer of the City of Chicago,
JAMES H. DILLARD, as Comptroller of the
City of Chicago, LUDWIG D. SCHREIBER,
as Clerk of the City of Chicago and
CITY OF CHICAGO, a Municipal Corpora-
tion,

Appellants.

APPEAL FROM

345 I.A. 297²

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

With the exception of the relator on whose behalf the action is instituted, the parties in this case are identical with those in People ex rel. Foley v. Prendergast et al., No. 45330, in which an opinion is being filed concurrently with this opinion. The order appealed from is identical in form with that entered in the Foley case. The orders differ only as to the name of the plaintiff, or relator, and the findings as to Rulo's relative standing on the eligible list for promotion to sergeant. In this case plaintiff alleges and defendants admit that "plaintiff's original standing on said Sergeant's list was No. 683 and his original grade was 73.77; that when the list was revised to allow for military credits for those persons who served in World War I, plaintiff's standing was then No. 791."

This case is governed by the decision in People ex rel. Foley v. Prendergast, supra. It is apparent that plaintiff is not eligible for certification for appointment if notices were given for filling the vacancies in the rank of sergeant found in the order. He has failed to show a clear legal right to the relief sought.

The judgment is reversed and the complaint dismissed at plaintiff's cost.

REVERSED AND COMPLAINT
DISMISSED AT PLAINTIFF'S
COST.

BURKE, P. J., and FRIEND, J., Concur.

SV A

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

345 I.A. 298

Defendant appeals from a judgment for \$10 entered against her on a verdict of guilty in an action brought by the City of Chicago on a complaint charging that on February 28, 1950 she did "conduct, operate and carry on the business of Home on the premises known as 3970 Drexel Boulevard, Chicago, Illinois, without first having obtained a license so to do, in violation of Chapter 136-2 of the Municipal Code of Chicago." By section 136-1 of the Municipal Code, "home" is defined to mean "any institution used for the reception or care of persons who are dependent or not capable of properly caring for themselves, and shall be understood to include homes for the aged or infirmed, orphans, asylums, half orphan asylums, refuges and shelters."

Defendant's principal objection is that she was called to testify as an adverse witness under section 60 of the Civil Practice Act or section 33 of the Municipal Court Act. The objection is based on a misconception of the nature of this proceeding. It is a civil suit. City of Chicago v. Knobel, 232 Ill. 112; City of Chicago v. Williams, 254 Ill. 360; City of Kewanee v. Puskar, 308 Ill. 167; City of Chicago v. Terniniello, 400 Ill. 23; Village of Riverside v.

Kuhne, 335 Ill. App. 547. In City of Chicago v. Knobel, supra, suit was instituted for violation of the city smoke ordinance. Defendant objected that section 25 of the Municipal Court Act of the City of Chicago requiring that petit jurors for the trial of cases in the Municipal court be provided by the jury commissioners of Cook county, was in conflict with section 9 of article 2 of the constitution of Illinois, which provides that the accused in all criminal prosecutions shall have a right to trial by an impartial jury "of the county or district in which the offense is alleged to have been committed." The court said:

"We think it is clear that this action, being one to recover a penalty for violation of a city ordinance, is not a criminal prosecution but a civil suit; that such a penalty could not be recovered in criminal proceedings. (Hoyer v. Town of Mascoutah, 59 Ill. 137; Ewbanks v. Town of Ashley, 36 id. 177; Town of Jacksonville v. Block, 36 id. 507; Baldwin v. City of Chicago, 68 id. 418; Town of Partridge v. Snyder, 78 id. 519.) This being so, said section 9 of article 2 cannot be here invoked."

For the same reason defendant's objection that she was compelled to give evidence against herself in a quasi-criminal proceeding cannot be sustained. The complaint sufficiently advised defendant of the charge against her and the evidence is sufficient to sustain the verdict of the jury.

The instruction that the jury had a right to consider the evidence in the light of its own observation and experience in the affairs of life, is a common instruction and could not mislead the jury. The further instruction that the jury must be fully satisfied that defendant kept and maintained an institution used for the reception and

-3-

care of dependent persons, aged or infirm, and who are not capable of properly caring for themselves, is, if anything, favorable to the defendant rather than prejudicial. Plaintiff was obliged to prove its case by a preponderance of the evidence and not to the satisfaction of the jurors.

The judgment is affirmed.

AFFIRMED.

BURKE, P. J., and FRIEND, J., Concur.

85

A

45404

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. ARTHUR L.
ISRAEL,

Appellant,

v.

GOLDBLATT BROS., INC., a
corporation,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

345 I.A. 299¹

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff filed statement of claim in the Municipal Court of Chicago against defendant under provisions of section 41 of the Illinois dairy and food law (Ill. Rev. Stat. 1949, chap. 56-1/2, par. 44) alleging that defendant had offered for sale, had in possession with intent to sell, and sold a package of dried fruit which was (1) misbranded under section 9 of the Act in that it failed to bear the name of the article, the name of the manufacturer and place of manufacture, or the name and address of the packer or dealer, and (2) adulterated under section 8 of the Act in that the product contained an unwholesome and injurious ingredient, namely, a compound or derivative of sulphurous acid. For each violation a \$100 fine was requested.

No affidavit of merits was filed, but defendant moved to strike the statement of claim on the grounds that before a person may sue in the name of the People of the State of Illinois there must be instituted an action or prosecution and the defendant convicted and fined thereunder, and secondly that the suit is a prosecution within

AMERICAN ...
... ..

... ..
... ..

... ..

... ..

... ..
... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

...

... ..

... ..

... ..

... ..

... ..

... ..

the provisions of Article VI, Section 33 of the Constitution of Illinois of 1870 and should have been filed in the name and by the authority of the People of the State of Illinois and not by an individual informer such as plaintiff, and should have been concluded with the language "against the peace and dignity of the People of the State of Illinois." The motion to dismiss was sustained below and judgment entered for the defendant.

The determinative question thus presented for review is whether section 41 of the Act provides for criminal action which must be brought by the People of the State of Illinois in conformity with the provisions of Section 33, Article VI of the Constitution of the State of Illinois, or for civil action in debt for collection of a penalty. The answer to this question requires a construction of the statute which is in words as follows:

"Any person convicted of violating any of the provisions of this act shall, for the first offense, be fined not less than fifteen (15) dollars, and not more than one hundred (100) dollars, or imprisoned not exceeding thirty days, or both, in the discretion of the court, and for the second and each subsequent offense, be fined not less than twenty-five (25) dollars and not more than two hundred (200) dollars, or imprisoned not exceeding one year, or both, in the discretion of the court. The fine may be sued for and recovered before any justice of the peace or any other court of competent jurisdiction in the county where the offense is committed, at the instance of the Department of Agriculture or any other person in the name of the People of the State of Illinois, as plaintiff, and shall be recovered in an action of debt."

Plaintiff interprets the statute as affording alternative relief. He insists that under the first

paragraph of the section an offender may be proceeded against by information prosecuted by the People of the State of Illinois, but that under the second paragraph an original suit in debt may be instituted for "the fine" by any person on relation of the People of the State of Illinois. He relies upon People v. Milwaukee Dairy Co., 244 Ill. App. 341, an action in debt for violation of the Illinois dairy products law and the Illinois dairy and food law, where it was held that suit brought under the provisions of a statute providing for fine or imprisonment, or both, is a civil and not a criminal action. It is to be observed, however, in that case that the statement of claim was brought by the People of the State of Illinois and concluded in the manner specified in the constitutional provision for the maintenance of criminal actions.

The authority relied upon for the conclusions reached in People v. Milwaukee Dairy Co. is People v. Gartenstein, 248 Ill. 546; however, in the Gartenstein case the statute under construction had to do with the unauthorized practice of medicine, and provided that a person practicing medicine without a license "shall forfeit and pay to the People of the State of Illinois, for the use of the State Board of Health, the sum of \$100 for the first offense and \$200 for each subsequent offense, to be recovered in an action of debt before any court of competent jurisdiction." It thus appears that in the Gartenstein case the court was dealing with a statute which contained no provisions as to imprisonment, but

-4-

provided for the institution of a civil suit to collect a penalty and for no other kind of proceeding whatsoever.

In the instant case, in referring to offenses arising under the Act, section 39a (par. 41) provides, "* * * and whoever offers for sale, exposes for sale or sells any food which is adulterated or misbranded or that violates any of the provisions of this act shall be guilty of a misdemeanor and punished as herein provided." (Italics ours.) Section 41 provides for the first offense a minimum and maximum fine (\$15 and \$100) and a maximum imprisonment (not exceeding thirty days), or both. We are of the opinion that the offense charged was a criminal offense within the meaning of the Constitution of 1870. Moreover defendant, if found guilty of the violations charged, was entitled to have the amount of the fine or length of the imprisonment, or both, determined by the trial court, such determination to be based upon the evidence adduced at the trial. We conclude, therefore, that the action brought by the plaintiff was void and unauthorized, and the judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Schwartz and Robson, JJ., concur.

86
45436

MAUDE KRUTCKOFF,)
Appellant,) APPEAL FROM SUPERIOR
v.) COURT, COOK COUNTY.
MABEL KRUTCKOFF et al.,)
Appellees.)

345 I.A. 299²

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff, Maude Krutckoff, appeals from two orders, one dated September 25, 1950, dismissing her amended complaint, the other of September 28, 1950, denying her motion to vacate said order of dismissal. The dismissal was on motions of defendants Mabel Krutckoff and Charles F. Schultz, individually and as executors of the estate of Charles Krutckoff (defendant Mabel Krutckoff's deceased husband), and Beryl H. Skivington, plaintiff's daughter.

The complaint consists of three counts. Count I, which seeks relief in equity, alleges substantially that plaintiff is the divorced wife of deceased Charles Krutckoff, who died October 11, 1948, and who obtained a divorce from plaintiff in 1925 in the Superior Court of Cook County, Illinois, as a result of fraud predicated on false personal service; that in 1926 when the plaintiff discovered such fraud, an oral agreement was entered into between herself and the decedent whereby Krutckoff, "in order to forestall and avoid adverse and scandalous publicity and possible criminal prosecution for his duplicitous acts," agreed to make provision in his will to pay her for her lifetime the alimony directed to be paid by the decree of the Superior Court, and to devise one-half

of his estate to the plaintiff; that thereafter, in February of 1935, as a result of an accounting it was determined that decedent was in arrear in alimony payments in the sum of \$8,000; that a new agreement was entered into containing substantially the provisions of the 1926 agreement but providing for a reduction in alimony, in which decedent agreed to make provision for the accumulated arrearages.

Count II incorporated substantially the allegations of Count I and asks that a judgment at law in the sum of \$500,000 be entered against the defendants Mabel Krutckoff and Charles F. Krutckoff because of their failure to perform the oral agreement of the decedent to execute a will. Count III incorporates the same allegations and asks for a judgment against Mabel Krutckoff, individually in the sum of \$500,000 for actual damages, and \$250,000 as punitive damages, for failure to carry out the oral agreement of the decedent to execute a will.

Defendants moved to dismiss the complaint and the motions were allowed. We are of the opinion that the dismissal of the complaint was proper. In the first place decedent's failure to carry out his alleged promise constituted a breach of contract and plaintiff's remedy was a claim against the estate. The Probate Court of Cook County has exclusive jurisdiction to hear and determine such claims against decedents' estates. Goodman v. McLennan, 334 Ill. App. 405. Furthermore, the measure of damages in such a suit would be the value of the property promised to be bequeathed, which should be ascertained and determined

-3-

in the Probate Court. In re Estate of Johnson, 389 Ill. 425, 429. Moreover it appears from the complaint filed herein that the consideration for the alleged oral contract was the promise of the plaintiff to the decedent not to reveal to the court the fraud and imposition imposed upon it in the divorce proceedings. Obviously such a contract is violative of every principle of good morals and is contrary to public policy.

The appeal is without merit, and the orders of the Superior Court of Cook County appealed from are therefore affirmed.

Orders affirmed.

Schwartz and Robson, JJ., concur.

87

A

45430

J. FRANK LINDSEY,
Appellant,

v.

SAMUEL S. EPSTEIN and
LIBERTY NATIONAL BANK
OF CHICAGO, as Trustee
under Trust No. 6578,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

345 I.A. 300

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an action for real estate broker's commissions by J. Frank Lindsey (appellant), against Samuel S. Epstein (appellee), and the Liberty National Bank of Chicago, as trustee under Trust No. 6578 (appellee).

Plaintiff's second amended complaint consists of two counts. Count I alleges that plaintiff, a licensed real estate broker, obtained from defendant Epstein a written contract for the sale of certain property located in Oak Park, Illinois. The listing agreement stipulated a sales price of \$130,000.00 with the balance of the purchase over and above the mortgage to be paid in cash. Plaintiff secured the buyer, one Pasquale R. Micaletti, on April 27, 1950, and presented to defendant a written offer signed by Micaletti to purchase the property for \$130,000.00, less the unpaid balance of the existing mortgage, with an earnest money deposit to be held by the Chicago Title & Trust Company or Baird & Warner. Defendant Epstein refused the offer and refused to pay plaintiff his commission of \$6,500.00, which he seeks to recover.

Under Count II plaintiff alleges in the alternative that the Liberty National Bank of Chicago held title to the premises as Trustee under a land trust. He further alleges that said trustee authorized and directed the defendant to procure a listing agreement for the sale of the property. The remaining allegations of Count II are the same as Count I except that it alleges that the offer was presented to and refused by the trustee. Plaintiff in the alternative seeks to recover his commission from defendant trustee.

Defendants filed their answer denying that plaintiff ever procured a buyer ready, willing and able to purchase on the terms and conditions as set forth in the listing agreement and that no binding contract was ever presented to the defendants pursuant to the terms of said listing agreement. The defendant bank, as trustee, stated that it held only the naked legal title to the premises and that under the trust agreement the management of the property was in the beneficiaries and that the trustee had no duties to perform except on the written direction as provided and that no beneficiary had the power to bind the trustee.

Defendants filed their motion for summary judgment supported by affidavits. Plaintiff filed his affidavit of merits in opposition to defendants' motion for summary judgment which consisted of affidavits of certain of the parties to the transaction. The trial court granted defendants' motion and summary judgment was

-3-

entered against plaintiff. Plaintiff contends that the trial court was in error in that defendants failed to establish beyond a reasonable doubt that they were entitled to judgment and that questions of fact were raised that were for decision by the jury.

It has been decided repeatedly in this state that the affidavits of the moving party in a motion for summary judgment must be strictly construed and the defending parties' affidavits liberally construed. Where the defendant moves for summary judgment he must establish his defense beyond a reasonable doubt. If it appears that there is a material issue of fact, it must be submitted to the jury or a court without a jury. Bertlee Co., Inc. v. Illinois Publishing and Printing Company, 320 Ill. App. 490; Scharf v. Waters, 328 Ill. App. 525; Great Atlantic & Pacific Tea Co. v. Town of Bremen, 327 Ill. App. 393; Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465. Therefore the affidavits of the respective parties must be construed with this law in mind.

The facts revealed by the affidavits of the parties show that the listing contract in question was executed by defendant Epstein on January 16, 1950, for the sale of certain premises in Oak Park. The sale price was \$130,000.00 subject to an incumbrance. The sale price over and above the incumbrance was to be paid in cash. A five per cent commission was payable to the plaintiff but no deposit required. Epstein reserved the right to revoke

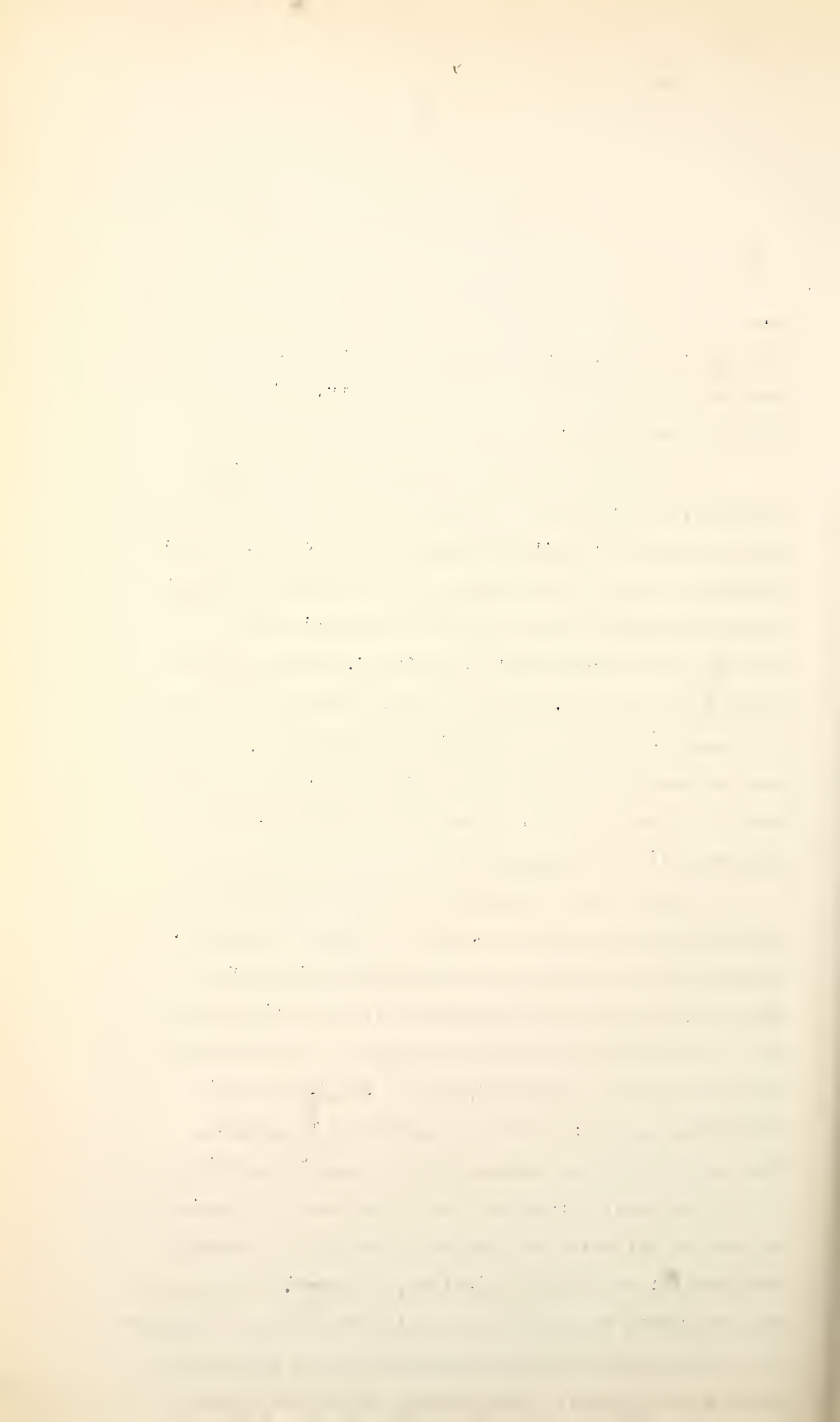
-4-

the listing by registered letter at any time before a purchaser was procured for the property. It was executed by Epstein as owner.

On the date of the execution of the listing contract, legal title was held and continued to be held by defendant Liberty National Bank of Chicago as trustee of a naked land trust. The beneficial owners of the land trust were defendant Epstein's wife Florence and daughter Rita, Evelyn S. Weinrob, Lillian Feliman and Jack L. Kaufman. By the terms of the trust agreement, Epstein and one Alec E. Weinrob, attorney, were granted the right to direct the Liberty National Bank as trustee to make deeds for or otherwise deal with the title to the property.

Thereafter, on April 18, 1950, Lindsey in cooperation with one B. A. Feller of Baird & Warner, procured an offer from one Pasquale Micaletti for \$130,000.00, the amount stipulated in the listing agreement. The offer was made in writing on a Chicago Real Estate Board Sale Contract Form No. 999, signed by Micaletti, and provided for a deposit of \$5,000.00. This information was communicated to Epstein by letter.

On April 19 Lindsey and Feller went to Epstein's office and met with Rita Epstein, daughter of defendant Epstein, and Albert J. Gilson, a lawyer. Gilson had been requested by Epstein to examine the offer. Plaintiff was informed by Gilson that they had a deal if the commission was reduced. This Lindsey and Feller refused



-5-

to do. A subsequent meeting was held on the following day with Gilson, and Lindsey agreed to reduce his commission to \$4,000.00. Defendants contend that Gilson objected to a rider setting forth the amount of the rents, which was in excess of the amount approved by the O.P.A. Plaintiff contends that Miss Epstein had authorized this rider and that there had been no objection by Gilson. A subsequent meeting was held with Alec Weinrob, an attorney who represented Evelyn S. Weinrob, Lillian Feliman and Jack L. Kaufman. He objected to the rental rider and asked to have the amount reduced or to hold up the closing of the deal until the increase of rents as shown by the rider was approved by the O.P.A. Another objection was registered by Weinrob to the provision that Baird & Warner hold the earnest money and contract in escrow. This was countered with the recommendation by plaintiff that the Liberty National Bank, which held title to the property as trustee, or Chicago Title & Trust Company act as escrowee. Weinrob refused to agree to either of these alternatives. Weinrob contends that at the close of the conference, because of the difficulties, he informed plaintiff that on behalf of the beneficiaries he was calling off the deal and that plaintiff's listing was cancelled and his agency revoked. Plaintiff denies that any such statement was made.

Defendants contend that Weinrob also proposed that the contract be signed by the trust beneficiary

-6-

rather than by himself as attorney for the trustee. This plaintiff denies. After the meeting with Weinrob, plaintiff obtained Micaletti's consent to eliminate the O.P.A. rental increase of \$1,000.00.

Plaintiff contends that on the morning of April 27 he informed Rita Epstein that the contract had been revised to meet defendants' objection to the rental rider and that he desired to have a meeting with reference to concluding the deal. On this same day a letter was written by defendant Epstein stating that Attorneys Gilson and Weinrob had advised him that the condition and terms of the contract were not satisfactory to the owners and any offer of sale made by him or any of the trust beneficiaries was revoked. The letter did not specify what the unsatisfactory terms were. This letter was not received by Lindsey until the 28th. Plaintiff went to Epstein's office but did not see defendant Epstein. He presented the revised contract to his daughter, Rita. She refused to discuss it. On the same day Lindsey mailed a letter to Epstein at his office stating that Micaletti stood ready, willing and able to buy the premises for \$130,000.00, all cash down to the mortgage, with a rental rider of \$22,716.00.

An examination of the affidavits indicates that the final contract, as submitted by plaintiff to defendant Epstein, substantially complied with all of the terms of the listing agreement and that the objections raised were in a large part frivolous. Spengler v. Eiger, 255 Ill.

-7-

App. 322; Smith, Executor, v. Keeler, 151 Ill. 518.

No question is raised by defendants' affidavits as to the fact that the purchaser was not ready, willing and able to buy, and at no time during the negotiations was any question raised as to the ability of Micaletti to purchase the property. For the purpose of the motion in question, this must then be presumed to be admitted. Defendants' subsequent attempt to revoke the listing, therefore, had no legal effect. Fox v. Ryan, 240 Ill. 391; Purgett v. Weinrank, 219 Ill. App. 28.

A study of the facts above set forth shows clearly that defendants' right to a judgment is not free from doubt. Issues of fact are raised. Applying the law heretofore cited, the inescapable conclusion is reached that the trial court erred in allowing defendants' motion. Judgment of the Circuit Court is reversed and the cause remanded with directions to overrule the motion for summary judgment.

Judgment reversed and the cause
remanded.

Tuchy, P. J., and Schwartz, J., concur.

88 A

45472

JACOB B. ROTHSTEIN and)
F. D. DOTSON, d/b/a)
BUSINESS CREDIT COMPANY,) APPEAL FROM MUNICIPAL
Appellee,)
v.) COURT OF CHICAGO.

LEGION ICE CREAM COMPANY,)
Appellant.)

345 I.A. 301¹

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This was an action in tort for damages in the sum
of \$615.00 for the alleged wrongful conversion by defend-
ant of certain personal property, which the plaintiff
claimed under a chattel mortgage and which defendant
claimed under two prior chattel mortgages. Plaintiff
made an oral motion for summary judgment and the court
sustained it and entered judgment against defendant for
\$465.00 and costs. Defendant appealed from that order
and judgment.

Appellee failed to file a brief in this case and
the decision is based upon the abstract of record and the
brief and argument for appellant.

Several grounds are relied on by the defendant
for reversal but the court's decision can be reached on
the one point, that a motion for summary judgment must
be in writing.

Subparagraph 3 of Rule 72 of the Civil Practice
Rules of the Municipal Court of Chicago provides:

"Every motion for summary judgment shall be filed
and notice thereof served upon the adverse party together
with copies of the supporting affidavits and all other
papers, at least five days before the hearing of such
motion. * * *"

Subparagraph 1 of Rule 73 of that Court provides:

"Affidavits in support of and in opposition to a motion by plaintiff or defendant for summary judgment shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counter-claims or defense is based, shall have attached thereto sworn or certified copies of all papers upon which the party relies; shall not consist of conclusions but of such facts as would be admissible in evidence; and shall affirmatively show that the affiant if sworn as a witness can testify competently thereto. * * *"

An examination of the record shows that no affidavits or supporting documents were filed with the motion for summary judgment. Under no stretch of the imagination does this meet the requirement of the foregoing rules. The court was in error in passing upon an oral motion for judgment without affidavits in support thereof. Rakowski v. Metropolitan Life Insurance Co., 313 Ill. App. 579.

The order of the Municipal Court entering a judgment for the plaintiff is reversed and the cause remanded for a new trial.

Judgment reversed and cause
remanded.

Tuohy, P. J., and Schwartz, J., concur.

89

A

45481

RAY LEWIS,)
Appellant,)
v.) APPEAL FROM SUPERIOR COURT,
CHECKER TAXI COMPANY,)
a corporation, and) COOK COUNTY.
GEORGE L. RUBEN,)
Appellees.)

345 I.A. 301²

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Ray Lewis (appellant), filed his complaint against defendants Checker Taxi Company, a corporation, and George L. Ruben (appellees), to recover damages for personal injuries sustained when he attempted to alight from defendant Checker Taxi Company's taxicab in which he was riding as a paying passenger. Trial was had before a jury and at the close of all the evidence both of the defendants made motions for directed verdicts of "not guilty," upon which the court reserved its ruling.

Upon submission of the case to the jury at the close of all the evidence the jury was unable to agree upon a verdict and thereupon the jury was discharged. Thereafter the trial court granted the motion of the defendants for directed verdicts of not guilty, entered judgment against plaintiff and in favor of both of the defendants upon said verdicts. The court denied plaintiff's motion for a new trial and also denied plaintiff's motion in arrest of judgment.

The facts reveal that defendant Checker Taxi Company's driver had picked up the plaintiff at his place of business and was requested to drive to his home at 925

-2-

Carmen avenue, Chicago, Illinois. He carried with him a table lamp with shade which he placed alongside of him on the seat of the cab. The driver proceeded to the street on which plaintiff lived. Carmen avenue is about forty feet wide. The street was slippery and cars were parked along both sides of it. As the cabdriver entered the street he was proceeding in a westerly direction on the north side. He pulled into the eastbound lane about thirty to forty feet from plaintiff's residence and proceeded to drive over to the left, or south side of the street, until he came in front of plaintiff's home. The cabdriver stopped the car on the left side of the street too close to cars parked along the left curb to permit plaintiff to disembark from the left side of the cab. Plaintiff paid his fare by giving the driver \$2.00, telling him to keep the change. Plaintiff states that he asked the driver, "How does it look?" The driver said, "O.K." and thereupon released the catch on the right rear door and pushed it open a bit. As plaintiff pushed the door further open with his right shoulder in an attempt to get out of the cab, defendant Ruben's automobile, which was traveling behind the taxicab, proceeded past the right side of the cab at a speed of approximately ten miles an hour and collided with the opening right rear door. The door slammed against the plaintiff who was knocked into the cab and sustained injuries to his head, face, teeth and other parts of his body.

Plaintiff contends that the court erred in granting

-3-

the motion for directed verdict as to the Checker Taxi Company on the grounds that it (1) was guilty of negligence in not providing a safe place for plaintiff to disembark, and (2) that the plaintiff was not guilty of contributory negligence as a matter of law such as would give the court the right to direct a verdict of not guilty. Plaintiff further contends that the court erred in granting the motion for directed verdict as to the defendant George L. Ruben in that defendant Ruben was guilty of negligence in permitting his car to collide with the door of the cab when he should have had knowledge that the plaintiff might attempt to disembark therefrom.

In passing upon defendants' motions for directed verdicts at the close of all the evidence, the court should consider only the evidence favorable to the plaintiff, rejecting any contradictory evidence, and should determine whether that evidence standing alone and admitted to be true together with all legitimate conclusions and inferences that may be drawn therefrom most favorable to plaintiff fairly tends to support his cause of action. Gorczynski v. Nugent, 402 Ill. 147; Weinstein v. Metropolitan Life Insurance Co., 389 Ill. 571; Houser v. Wabash Railroad Co., 341 Ill. App. 31. It was necessary that plaintiff establish the essential elements of this cause of action for negligence by showing (a) the existence of a legal duty, (b) a negligent failure to perform that duty, and (c) an injury as a proximate result of such negligence. McClure v. Hoopeston Gas Co., 303 Ill. 89;

Langston v. Chicago & N. W. Ry. Co., 398 Ill. 248; Minters v. Mid-City Management Corp., 331 Ill. App. 64.

An examination of the evidence against the defendant Checker Taxi Company, shows that the plaintiff was a passenger in the cab. The carrier owed him the highest degree of care. Louis v. Checker Taxi Company, 318 Ill. App. 71; Frank Parmelee Co. v. Wheelock, 127 Ill. App. 500.

Defendants contend that the failure of plaintiff to properly ascertain whether it was safe to alight or not was adequate for the court to direct a verdict on the grounds of contributory negligence. This view we do not hold tenable in that plaintiff asked defendant driver if it was safe to alight and he said, "O.K." and opened the catch on the door. We are of the opinion that on making the statement and opening the door the plaintiff was justified in believing that the driver had observed that it was safe for him to alight. It was the negligent act of the driver in pulling too close to the parked cars on the wrong side of the street that necessitated plaintiff's attempting to get out of the right-hand door. Plaintiff had not left the cab but had merely pushed the door open about a foot when the car driven by the defendant Ruben struck the door throwing the plaintiff to the floor and injuring him.

We are of the opinion that plaintiff made out a prima facie case against the cab company on the foregoing facts both as to the negligence of the cab company and the

-5-

exercise of due care on his part. Neither of those questions could be properly decided by the trial court as a matter of law, but both were questions of fact for the determination of the jury. Jacobsen v. Cummings, 318 Ill. App. 464, 481.

We, therefore, find that the trial court erred in sustaining a motion for a directed verdict for the defendant Checker Taxi Company.

An examination of the testimony of the plaintiff and of the defendants as to the acts of defendant Ruben, shows that the plaintiff did not see Ruben's car prior to the time that it struck the door of the taxicab. Ruben's testimony is undisputed that he was proceeding along carefully at a speed of fifteen to twenty miles per hour following the cab; that he saw the cabdriver pull to the left side of the street; that when he saw it slow down he slowed down to about ten miles per hour. At that time he was about fifteen feet behind the cab. The cab came to a stop and he proceeded to pass it when suddenly the door was pushed open and he collided with it. He was driving in his own lane of traffic. These facts lead to the inescapable conclusion that plaintiff failed to show or prove any negligence on the part of the defendant Ruben.

The trial court was justified in entering a verdict of not guilty as to the defendant George L. Ruben.

The order of the trial court directing a verdict

-6-

of not guilty as to the defendant Checker Taxi Company is reversed and remanded for a new trial.

The directed verdict of not guilty as to the defendant George L. Ruben is affirmed.

Affirmed in part, reversed
in part.

Tuohy, P. J., and Schwartz, J., concur.

94
A
45305

HENRY S. BLUM,

Plaintiff - Appellee,

v.

MORRIS KURTZON,

Defendant - Appellant.

) APPEAL FROM

) SUPERIOR COURT,

) COOK COUNTY.

) 345 I.A. 302¹

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit for attorney's fees and expenses. Trial without a jury resulted in a judgment for \$26,326.75 in plaintiff's favor. Defendant has appealed.

The complaint is in eighteen counts. The first count alleges rendition of legal services at defendant's request from May, 1944 to January, 1948, and the reasonable value of the services. These allegations are included by reference in the remaining seventeen counts. In each of these, plaintiff alleges an account stated on various dates during the period mentioned. In the bill of particulars, it is stated that defendant expressly agreed to pay plaintiff and his associates respectively \$25.00, \$20.00, \$15.00 and \$5.00 per hour.

The issues made at the trial were whether the services rendered were necessary or of the value claimed; whether there was an agreement on hourly rates; and whether plaintiff was required to allege and prove the fairness of the charges.

The questions on appeal are whether the contract is unenforceable as against public policy, and whether the judgment is against the manifest weight of evidence.

✓



With respect to the first question, defendant contends that plaintiff accepted employment as defendant's attorney merely to harass defendant's adversaries and delay settlement, and that the plaintiff thereby violated Canon 30 of the American and Chicago Bar Associations' Code of Ethics. This point was not raised by defendant in his pleadings or at the trial. We are asked to pass on the contention notwithstanding this fact. We think that where a contract is not by its express terms against public policy but rests upon proof, the defense must be raised in the trial court and the plaintiff be given an opportunity to meet the defense. Crichfield v. Bermudez Asphalt Paving Company, 174 Ill. 466, 483-4. In this case the question of harassment is disputed here but was not raised in the trial court. It follows, therefore, that the point is not properly before us and we shall not consider it.

Implied in the question on manifest weight of evidence are questions of burden and quantity of proof arising from the nature of the attorney-client relationship. Plaintiff did not rely at the trial upon the presumptive obligation arising from the rendition of the accounts which it is alleged defendant in each instance retained with neither question nor objection, and in some instances made substantial payments on the account. The attorneys recognized at the trial that unlike the rule with respect to accounts stated in ordinary relationships, an attorney has the burden of showing the fairness of the account based on the attorney-client relationship. Woods v. First National

Bank of Chicago, 314 Ill. App. 340; Comerford v. Loewenbein, 227 Ill. App. 321; Henry and Robinson v. Park Fire Proof Storage Company, 222 Ill. App. 317; Henry and Robinson v. LeMoyne, 219 Ill. App. 313; Ward v. Yancey, 78 Ill. App. 368.

Plaintiff's attorney assumed the burden of proving an agreement for fees based on hourly rates before plaintiff entered into the relationship, and in general terms, the nature of services rendered which were the basis of the statements of account. Plaintiff testified that he considered the agreement for fees and the corresponding statements rendered reasonable in view of his experience and the nature of the services. Defendant did not controvert the reasonableness of the fees by contrary proof before the judgment was entered nor within the three weeks thereafter during which he was given an opportunity to present that testimony. He introduced schedules of minimum fees promulgated by the Chicago and Illinois Bar Associations. These schedules obviously do not controvert plaintiff's testimony on this issue.

We think it is unnecessary to recite the evidence in support of each statement of account. Copies of statements that plaintiff testified were sent to defendant were received in evidence. The first was sent April 1, 1945, the last December 31, 1947. Other statements covered the periods between these dates. Plaintiff testified, with respect to each statement, to "series of conferences," "numerous meetings," "continuous conversations," "days of arguments," "other questions," etc. In some instances, especially on cross-examination, plaintiff's testimony was more specific with

reference to numbered cases, particular pleadings, numbers of pages of testimony, and types of cases. There were also introduced copies of original time sheets covering most of the time consumed in rendering the services for which the statements were rendered.

The time sheets are typewritten, each consisting of the date on which the services were rendered, the general reference to what was done, and the amount of time consumed in rendering that service. The description in many instances is "work on matter." Most of the references, however, are more specific in describing the services. There are references to conferences with Kurtzon and other named persons, to preparation of pleadings, to telephone conversations with named persons, preparation, dictation, conferences with named lawyers, conferences at places other than plaintiff's office, and at named plants. It is needless for us to recite in detail the contents of these timesheets.

Plaintiff testified that each day that he rendered services for defendant, he made "a scrap memorandum of the time," and the following day or soon thereafter the memoranda were transcribed on the time sheets by plaintiff's secretary. There was testimony too that the same process was used by plaintiff's associates in recording time spent by them. Many items in the time sheets were sufficiently specific to enable defendant, if he desired, to controvert them by testimony of persons named in the items.

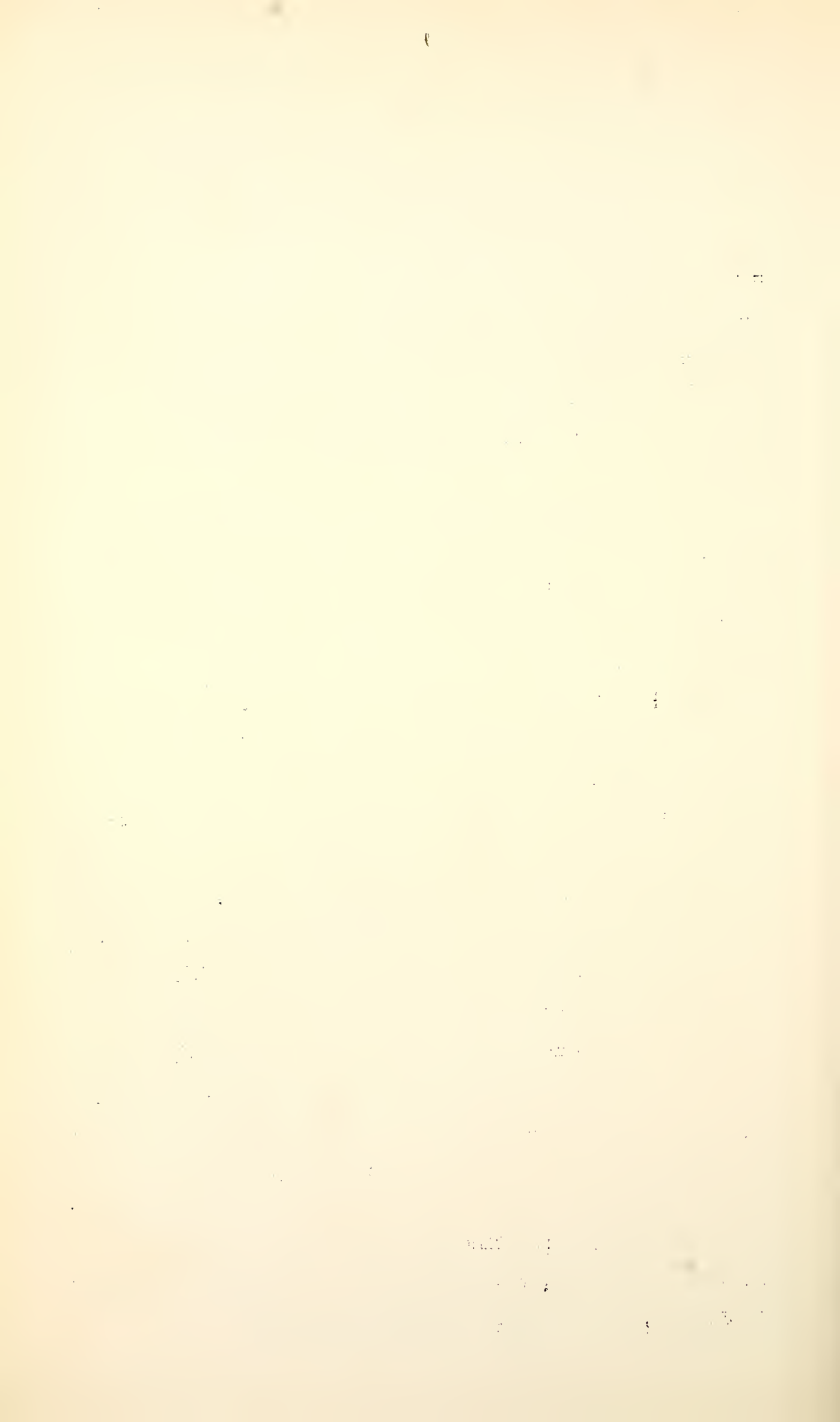
We cannot say that the trial court should have disbelieved testimony for plaintiff that the statements were mailed by him, received by defendant, discussed between them, and approved by defendant. We cannot say the trial court should not have believed plaintiff's testimony that in each instance after a statement was rendered plaintiff tendered time sheets which were the basis of the statements to defendant for his examination, and that on each occasion defendant did not avail himself of the opportunity to examine the timesheets, question them, ask for more specific information, etc. The trial court was justified in believing that before plaintiff rendered any services, defendant had agreed to pay \$25.00 for the services of plaintiff and his associate Keating (later reduced to \$20.00 per hour for the latter), \$15.00 per hour for associate Sang, and \$5.00 per hour for associate DeFalco.

The trial court could reasonably find from the evidence that during the period of more than three and one-half years, defendant made no complaint, made payments on account, made repeated promises to pay, and disregarded a letter from plaintiff in September, 1946 calling defendant's attention to the growing size of the fee bill, and to the attorney's pessimistic outlook of the good to be derived from the litigation.

Defendant argues that the exhibits introduced by plaintiff in making proof of the amount of the fees recoverable disclose a discrepancy in defendant's favor of more than \$10,000. This argument rests on a calculation of the

time spent as recorded on the timesheets at the hourly rates claimed by plaintiff. He argues also that the exhibits likewise show a discrepancy in the amount of costs which plaintiff claims to have incurred and which were allowed in the judgment.

The judgment order was signed February 23, 1950. A motion to vacate the judgment was entered and continued in order to give defendant an opportunity to controvert the reasonableness of plaintiff's fees, and presumably also to permit him to investigate the exhibits. According to defendant's brief filed in support of the motion to vacate, plaintiff overcharged defendant because the timesheets in evidence failed by more than \$10,000 to substantiate the statements of fees. Plaintiff filed an opposing brief and affidavits to support it. From these affidavits it appears that time sheets covering services by plaintiff's associates, for the periods from December 26, 1945 to September 21, 1946, April 24, 1946 to November 29, 1946, and January 16, 1946 to September 20, 1946 were lost or misplaced and were not in the record. It further appeared that the missing sheets had been lost or misplaced in preparation for the trial, were not introduced in evidence, and that the omission was not detected until defendant's brief was filed in the trial court. It further appeared that the bill of particulars filed by plaintiff was prepared from time sheets, including the missing ones, were complete, and substantiated the statements of fees. On June 13, 1950 the motion to vacate was denied.



Each statement of fees contained the total hours of work on which the fees were based. The total number of hours shown on the statements substantially supports the statements of fees. There was no cross-examination at the trial which disclosed the missing time sheets nor which elicited information about the number of hours consumed during the periods mentioned. We think that the statements and testimony in support of them, under the circumstances in this case, were sufficient proof of what the statements contained.

Defendant contends that in any event he is entitled to a credit of \$6,000 arising out of a loan transaction which he contends was made for plaintiff's benefit and for which defendant was to have received credit to the extent of the loan. Plaintiff testified that only \$4,000 of the loan was to be applied on the fee account, and that the balance of \$6,000 represented a loan by defendant to a Mexican corporation in which plaintiff had an interest. In a statement of fees of June 13, 1947 plaintiff shows a credit to defendant of \$4000. Taking plaintiff's testimony as true, this statement of fees was approved without objection by defendant. Before judgment in the trial court and at oral argument in this court, plaintiff offered to credit defendant with the balance of \$6,000 in consideration of defendant relinquishing the \$6,000 corporate debt to plaintiff. The offer was not accepted. We see no merit in this contention.

One piece of litigation for which plaintiff claimed fees was a partition suit in which associate counsel were employed to represent defendant. The associate counsel were paid \$10,000. Plaintiff testified he expected to be paid one-third of that fee. Whether defendant knew of and approved this arrangement was a disputed question of fact. No showing has been made which would impel us to interfere with the trial court's determination and to reduce the judgment by one-third of \$10,000.

We think the findings of the trial court implicit in the judgment and the judgment itself, except as herein- after noted, are not against the manifest weight of evidence.

It is conceded by plaintiff in this court that the judgment is excessive in the amount of \$1,000 due to a mistake in multiplication.

For the reasons given, the judgment is affirmed for \$25,326.75.

JUDGMENT AFFIRMED AS MODIFIED.

LEWE AND FEINBERG, JJ. CONCUR.

One piece of litigation for which plaintiff claimed fees was a partition suit in which associate counsel were employed to represent defendant. The associate counsel were paid \$10,000. Plaintiff testified he expected to be paid one-third of that fee. Whether defendant knew of and approved this arrangement was a disputed question of fact. No showing has been made which would impel us to interfere with the trial court's determination and to reduce the judgment by one-third of \$10,000.

We think the findings of the trial court implicit in the judgment and the judgment itself, except as herein after noted, are not against the manifest weight of evidence.

It is conceded by plaintiff in this court that the judgment is excessive in the amount of \$1,000 due to a mistake in multiplication.

For the reasons given, the judgment is affirmed for \$25,326.75.

JUDGMENT AFFIRMED AS MODIFIED.

LEWE AND FEINBERG, JJ. CONCUR.

345 ILL. App.

A

45389

SOPHIE SCHACHT,

Plaintiff - Appellant,

v.

ROBERT ELLIOTT,

Defendant - Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

345 I.A. 302²

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The complaint charged defendant with negligence and wilful and wanton conduct. At the close of all the evidence, the court struck the wilful and wanton count from the complaint. The negligence issues were submitted to the jury. The verdict was not guilty and a special interrogatory found plaintiff guilty of contributory negligence proximately contributing to her injuries. Judgment was entered on the verdict and plaintiff has appealed.

This is the second appeal in the case. In the previous trial, verdict and judgment were for plaintiff in the amount of \$500. Plaintiff appealed. This court reversed the judgment and remanded the cause for new trial. 332 Ill. App. 557. We said that there was a sharp conflict in the testimony, and if the jury believed testimony for plaintiff, the damages allowed were inadequate. The second trial resulted in a disagreement of the jury. The instant appeal is from the third trial.

The accident occurred Saturday, September 30, 1944 about 4:00 P.M. in front of the Cuneo Building on the south

1861

1862

1863

side of Cermak Road west of Canal Street in the city of Chicago. The Cuneo Building is on the southwest corner of Grove Street and Cermak Road. Grove Street ends at the south side of Cermak Road. It is one-half block west of Canal Street. The west boundary of the Cuneo Building is the east bank of the south branch of the Chicago River. The main entrance and exit of the building is about thirty feet east of the east edge of the bridge across the river.

Plaintiff, an employee of Cuneo Press, had finished work, left the building through the main exit, and was crossing Cermak Road to board a westbound street car which was waiting for passengers on the north side of the street. Defendant was driving east on Cermak Road. His automobile collided with plaintiff, severely injuring her.

Plaintiff contends, among other things, that the trial court erred in withdrawing the wilful and wanton count from the jury. Defendant states that in the first trial also the wilful and wanton count was withdrawn from the jury. In the first appeal, 332 Ill. App. 557, we did not pass on the propriety of the court's withdrawal of the wilful and wanton count. The question, therefore, is open before us for the first time.

We apply the familiar rule favorable to the party affected adversely by the ruling in deciding whether the ruling was improper. We consider only the evidence favorable to plaintiff and draw from it legal inferences in the light most favorable to her to determine whether there is any evidence tending to prove the elements of a wilful and wanton cause of action.

Defendant had driven "over the bridge, both east and west, many times." He knew there was a "Slow" sign at Canal Street facing those approaching the bridge from the east. There was a sign at the west approach to the bridge reading: "Slow---20 Miles Per Hour." We infer that defendant knew or should have known of this sign. He knew that employees of Cuneo Press crossed the street to board west-bound street cars at a point opposite the exit of the Cuneo Building. Since he had been over the bridge many times, we infer he knew or should have known that employees crossing the street at that point could not see all the way across the bridge to the west because of the upward grade of the approaches and the structure's curved surface. We infer that he knew or should have known that the exit from which the Cuneo employees passed to cross the street was about thirty feet east of the east edge of the bridge.

There is testimony that plaintiff came out of the Cuneo Building, looked to the west while on the sidewalk, and could see halfway across the bridge; that she looked to the east, began to cross the street and remembers no more; that defendant was going 35 miles per hour as he left the bridge; that there was a screeching of brakes; that defendant's car skidded and that it struck plaintiff east of the exit; and that the impact knocked plaintiff almost six feet into the air. There is a reasonable inference from the testimony that defendant's car skidded about 55 feet from the bridge to the point at which it stopped.



We think the foregoing testimony and inferences tend to prove that defendant intentionally disregarded the "Slow---20 Miles Per Hour" sign west of the bridge; that he was conscious of the upward grade of the approaches to, and the curved surface of, the bridge and its consequent obstruction of vision; and that he was conscious of the Cuneo exit and knew that employees crossed the street opposite the exit about thirty feet east of the edge of the bridge. We think that because of this consciousness and knowledge reasonable men could infer that there was an absence of care on the part of defendant for plaintiff's person such as exhibited a conscious indifference to consequences. It follows that the trial court erroneously withdrew the wilful and wanton count from the jury. Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569; Bernier v. Illinois Central R.R. 296 Ill. 464.

Bartolucci v. Falletti, 382 Ill. 168, is not authority for the defendant's argument on this question because plaintiff there contended that violation of a speed statute alone was enough to take the case to the jury. Furthermore, there was a "conspicuous lack of proof" of the necessary elements of a wilful and wanton cause of action. There, plaintiff was a guest injured when the wheel of an automobile came off and the automobile skidded over an embankment from an icy, curved road. Similarly, in Clarke v. Storchak, 384 Ill. 564, there was no excessive speed and there were no circumstances which rendered the speed of the defendant's automobile sufficiently dangerous to establish wilful and wanton conduct.

Defendant argues that he could not be guilty of wilful and wanton conduct because the jury has found in his favor on the negligence count. We do not know the basis of the jury's verdict. The jury did find, in the special verdict, that plaintiff was guilty of lack of due care for her own safety. This finding would not preclude her recovery if the jury found the defendant guilty of wilful and wanton conduct.

It is not necessary for us to pass on any other point raised. We think in justice to both parties, however, that we should comment on the instructions given to the jury. Of the sixteen instructions given on behalf of the defendant, six concluded with the words "not guilty" or "cannot recover" or words of similar import. One other contained the expression "not entitled to recover" in the body of the instruction. Six of the instructions referred to the question of plaintiff's contributory negligence, one of them repeatedly so. The courts have condemned repetitious use of the expression "not guilty" or its equivalents (Gulich v. Ewing, 318 Ill. App. 506) and unduly numerous references to contributory negligence (Borucki v. McLaughlin, 344 Ill. App. 550; Baker v. Thompson, 337 Ill. App. 327) in jury instructions. The evil in such practice lies in the possible effect it may have on the minds of the jurors by giving the impression that the court favors one side or the other on the issues of fact.

For the reasons given, the judgment is reversed and the cause remanded for a new trial of the issues under both the negligence and wilful and wanton counts.

JUDGMENT REVERSED AND CAUSE REMANDED FOR NEW TRIAL.

LEWE AND FEINBERG, JJ. CONCUR.

96

A

45386

345 I.A. 303

THEODORE PRIMIS,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for personal injuries allegedly resulting from the negligence of defendant in permitting a defective and dangerous condition on a safety island belonging to the City and under its control. A trial with a jury resulted in a verdict and judgment for \$25,000, from which defendant appeals.

The safety island in question was located on the west side of Western Avenue where Western, Gunnison and Lincoln Avenues intersect. Previous to the accident in question the defendant removed a light pole located at the north end of the safety island in question, and a cement patch, oval in shape, a foot in diameter and approximately three-quarters of an inch in height, was placed over the hole left by the removal of the pole. In the course of time it appears that this patch chipped away, exposing the edge of a pipe about three-quarters of an inch high.

At about the hour of 6:30 A.M. on December 22, 1947, plaintiff was walking on Gunnison Avenue and hurried east across Western Avenue to the safety island, in his desire to board an approaching southbound Western Avenue streetcar. He testified that it was dark; that when he

1. The first part of the

document is a list of

the names of the

persons who have been

admitted to the

organization since

the last meeting.

The names are listed

in alphabetical order.

The names are as follows:

John Doe, Jane

Smith, Robert

Johnson, Mary

Williams, David

Miller, Susan

Wilson, James

Moore, Elizabeth

Anderson, Charles

Clark, Patricia

Green, Thomas

White, Margaret

Black, William

Gray, Richard

reached the safety island he stepped on the safety island with his left foot, and as he brought his right foot forward he tripped over something in the ragged broken patch of cement on the island and fell forward against the moving streetcar; that his legs became pinned in the step of the streetcar; and that he was dragged several feet by the streetcar and was injured. ✓

At the point where plaintiff left the sidewalk on Gunnison Avenue, the sidewalk is almost at right angles with the north end of the safety island, where the alleged defective condition was located.

The only grounds for reversal relied upon by defendant are, that the verdict of the jury and the judgment are against the manifest weight of the evidence, and that the trial court erred in denying defendant's motion for a directed verdict because, as a matter of law, the defect complained of is so slight that the City is not chargeable with negligence. ✓

The only witness for defendant who claimed to be an eyewitness to the accident was the conductor of the streetcar in question. He located the accident at approximately the center of the safety island, a considerable distance south of the location of the alleged defect. He testified that at that point he saw the plaintiff trip on the edge of the island as he stepped on it; that he fell forward with his face down; and that plaintiff, in falling, at no time contacted the moving streetcar. This is in sharp conflict with the testimony of plaintiff as to how and where the accident happened.

Contradictions appear in the testimony of the conductor. In a deposition given by him before the trial he testified that when plaintiff tripped the car was standing still, but upon the trial he said that when plaintiff tripped the car was in motion. Upon the trial he first testified that he helped the plaintiff up after he fell; that the motorman came back but did not assist plaintiff into the car. Upon cross-examination he contradicted himself and said that he did not help the plaintiff up after he fell. The motorman in his testimony contradicted the conductor. He testified that he saw the conductor help plaintiff up, and that he walked back to the rear of the car and helped the conductor assist the plaintiff to the streetcar.

Aside from these contradictions the medical testimony for plaintiff, not challenged upon this appeal, established the location of the injuries, making it physically impossible for the plaintiff to have sustained such injuries if he fell forward upon his face, as the conductor testified. The medical testimony is that X-rays taken of plaintiff's spine and of his back and legs showed the first and second lumbar vertebrae were definitely compressed and squashed like a "marshmallow"; that there was a compression fracture of the two vertebrae and a compression fracture of the sixth dorsal vertebra; that it was necessary to fit plaintiff for a steel back brace, consisting of two bars running up the whole length of the back and across the back of the shoulder; that to these

-4-

bars are attached bands that run back and fasten to the bars and keep plaintiff standing in this position; that plaintiff cannot bend his arms forward, nor can he bend his back; that the brace is necessary because when it is removed any effort to bend the spine results in a muscle spasm in the back; and that the condition described existed at the time of the trial.

In the light of this medical testimony the jury had a right to believe that plaintiff could not have sustained the injuries described by the doctor if he had fallen as the conductor testified.

It is plain, under these circumstances, that it is the function of a jury, in the conflict between the conductor and plaintiff as to where and how the accident happened, to determine where the truth lies and to judge the controverted facts. Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143; affirmed, 401 Ill. 172. In People v. Hanisch, 361 Ill. 465, the court said:

"Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

The photographs in evidence disclose the size and character of the alleged defect on the safety island. The

-5-

jury had the opportunity to determine from them the extent of the defective condition. We cannot agree with defendant's contention that the defect was so slight that we should say, as a matter of law, defendant is not chargeable with negligence. White v. City of Belleville, 364 Ill. 577.

The record amply supports the judgment, and it is affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

97

A

45440

JULIUS S. NEALE, as Trustee under
Trust Agreement dated July 26, 1943,

Plaintiff,

v.

ARCHIE PARKS, et al.,

Defendants.

ELIZABETH DRUGGAN,

Counterplaintiff - Appellee,

v.

JULIUS S. NEALE, as Trustee, and
ARCHIE PARKS,

Counterdefendants - Appellants.

345 I.A. 304¹

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal Archie Parks, defendant, and Elizabeth Druggan, counterplaintiff, seek to reverse a decree entered upon the amended and supplemental petition of counterplaintiff. The cause was appealed directly to the Supreme Court, where it was transferred to this court on the ground that it did not involve a freehold. (Neale v. Parks, 408 Ill. 212).

In 1921, counterplaintiff Elizabeth Druggan, a widow, purchased the premises consisting of two apartments commonly known as 4912 West Washington Boulevard, in the City of Chicago, Illinois. August 2, 1940, Mrs. Druggan obtained a loan from the Home Federal Savings Association of Chicago, hereafter called the Association, for the sum of \$5,000. To secure the payment of the loan she executed

-2-

a mortgage and a note for that sum with interest at five per cent per annum payable in monthly installments at the rate of \$39.50.

About January 10, 1941, Mrs. Druggan conveyed the premises involved by quitclaim deed to Edith Phillips, and on January 30, 1942 Edith Phillips executed and delivered a deed to the premises to defendant Archie Parks. June 27, 1943, Bernard Vinissky, a lawyer, purchased the mortgage from the Association. Afterward Vinissky created a trust for the sole purpose of holding the mortgage, and named plaintiff, Julius S. Neale, as trustee. Mrs. Druggan failed to pay the principal and interest installments, and also failed to make certain deposits for general taxes and insurance as provided in the mortgage, whereupon the plaintiff declared the entire sum due. August 3, 1943 he filed a complaint to foreclose the mortgage naming Mrs. Druggan, among others, as a party defendant. Mrs. Druggan was not served with process and the cause was, on plaintiff's motion, dismissed as to her without costs.

October 21, 1943, Elizabeth Druggan filed a petition praying that she be permitted to become a party to the foreclosure proceeding and to file her cross-bill or, in the alternative, that she be permitted to pay the principal and interest of the mortgage and other moneys due; that the decree of foreclosure be vacated, and that the deeds conveying the premises in controversy to Edith Phillips and from Edith Phillips to Parks, though absolute in form, be declared to be mortgages.

October 17, 1945, Reuel H. Grunewald, pursuant to an order of court, deposited in behalf of Mrs. Druggan with the clerk of the court the sum of \$6,500 in cash, to be applied on account of the indebtedness due plaintiff under the terms of the foreclosure decree.

October 25, 1945, Elizabeth Druggan filed an amended petition alleging in substance that she owned the premises involved since 1921; that she conveyed the property to Edith Phillips for the purpose of obtaining a loan for \$1,600; that Edith Phillips, without her knowledge and consent, deeded the premises to Parks; that neither Edith Phillips nor Parks paid any consideration for the deeds; that the money paid to the Association for the purchase of the mortgage sought to be foreclosed was furnished by Parks; that plaintiff Neale permitted his name to be used for the benefit of Parks; that Bernard Vinissky, who instituted the foreclosure proceedings for plaintiff, was also acting as attorney for Parks and collected rents on behalf of Parks from the tenants occupying the premises. Mrs. Druggan was given leave to intervene in the cause and made a party defendant. ✓ X

Plaintiff answered, denying substantially all of the allegations of the petition filed by counterplaintiff. Parks also filed an answer averring in substance that Mrs. Druggan voluntarily conveyed the premises to Edith Phillips and that the deed from Edith Phillips to Parks was executed and delivered with counterplaintiff's knowledge and consent.

The master found that there was no consideration for the execution of the deed from Mrs. Druggan to Edith Phillips and that Edith Phillips took the title only for the purpose of influencing the mortgagee to refrain from the threatened foreclosure; that Parks accepted the deed as security for loans made to Terry Druggan, counterplaintiff's son, and recommended that upon the payment of the amounts due under the mortgage and the sums advanced by Parks upon the mortgage and for the maintenance of the premises in question, Parks and plaintiff should cancel and release the trust deed; that Parks convey all his interest in the premises to Mrs. Druggan, and that the foreclosure suit be then dismissed for want of equity, all the notes be cancelled; and that the costs be shared equally by both parties.

The chancellor overruled certain exceptions to the master's report and sustained others, and found that Mrs. Druggan was entitled to redeem the premises in question by paying Parks the sum of \$6,045.78 without interest, less the amount shown due her upon an accounting by Parks for rent which he received from tenants in the premises after August 1, 1943 to December 31, 1947.

The decree further found that Vinissky, attorney for plaintiff, owned the mortgage and hence could not recover attorney's fees; that the \$6,500 deposited in court by Grunewald as agent for Mrs. Druggan should not bear interest; that Mrs. Druggan is entitled to redeem the premises by paying Parks the sum found due him when the account is stated

and approved by the court; that the deed from Edith Phillips to Parks is in the nature of a mortgage to secure the moneys advanced by Parks to Terry Druggan; that Parks knew or should have known that Edith Phillips held the title for the benefit of Mrs. Druggan.

It is undisputed that John Phillips, an attorney, was a friend of the Druggan family; that Mrs. Druggan conveyed the premises to John Phillips's wife Edith for the purpose of obtaining a loan for Mrs. Druggan and thus to forestall legal action on the mortgage which was in default, and that Mrs. Druggan never received any consideration for the execution of the deed to Edith Phillips. The finding in the master's report and in the decree that the deed from the counterplaintiff to Edith Phillips was intended as a mortgage to secure a loan, is supported by uncontroverted testimony.

There is a sharp conflict in the testimony with respect to the other transaction involving the deed from Edith Phillips to defendant Parks. Parks testified in substance that the first time he had any conversations with anyone concerning the execution of the deed to him was in December 1941 "just before Christmas" when he visited Terry Druggan at the premises in question, where Druggan was living at that time; that at this and following visits Druggan asked for more money; that Druggan stated that he owned the property at 4912 Washington Boulevard and would give a deed to the premises in consideration of five thousand dollars; that the witness made a counter offer to accept the deed in

consideration of five thousand dollars and the sums of money loaned Druggan during the preceding year; that the deed was delivered to the witness at Druggan's apartment in "the early part of February 1942" by Druggan, in the presence of John Phillips; and that simultaneously with the delivery of the deed Druggan stated to the witness that "the property is yours now."

Parks also testified that he did not have a search made of the record to determine the merchantability of the title for the reason that Phillips assured him that he was an expert in real estate and would see "that everything was all right"; that during these discussions at the Druggan , apartment the name of Elizabeth Druggan, counterplaintiff, was not mentioned by anyone, nor was the witness told that Mrs. Druggan had any interest in the premises; that afterwards he took the deed to his home where he put it in a desk; and that some time later he showed the deed to his brother who suggested that it be recorded.

The record also discloses that a number of checks and other documents were introduced by Parks, indicating that Parks advanced considerable sums of money to pay for coal, , lumber, horses, feed for horses, paint, employees of Druggan, and payments on account of the mortgage. It is uncontroverted that after the deed was delivered by Edith Phillips to Parks, John Phillips continued to manage the property. Afterwards Parks complained to Terry Druggan that he had not received any rent, and that the premises were being mismanaged. Early in 1943, Parks engaged Vinissky to manage the property.

John Phillips testified that he had informed Parks before the title was conveyed to him that Edith Phillips was holding the title in trust for the counterplaintiff Mrs. Druggan.

The record also shows that Grunewald, an attorney, testified that before the foreclosure proceeding was instituted he met Vinissky and told him that Mrs. Druggan wanted to pay the principal and interest due under the terms of the mortgage, that he had sufficient funds available to make the payment in full; that Vinissky agreed upon receipt of payment to surrender the notes and other indicia of ownership of the mortgage to Grunewald, and that shortly thereafter plaintiff, at Vinissky's request, instituted foreclosure proceedings. Grunewald's testimony was corroborated by an office associate. Vinissky denied Grunewald's offer of payment. According to Parks's testimony he later employed Vinissky as his attorney.

Terry Druggan did not testify. Counterplaintiff Elizabeth Druggan denied having any knowledge of the execution and delivery of the deed from Edith Phillips to Parks.

Parks was employed as a superintendent of a manufacturing business. He admits that he had many business transactions with Terry Druggan and lent him considerable sums of money. It seems incredible to us that Parks, in view of his business experience, would accept a deed from Edith Phillips without having a title search made of the premises, if he intended to acquire a fee simple title.

From a careful reading of the record we think there is ample evidence to sustain a finding that the deed from Edith Phillips to Parks, though absolute in form, was given as security for loans made by Parks to Terry Druggan without any authority from counterplaintiff Elizabeth Druggan.

The master found that "it would appear equitable" to allow Parks advances he made for maintaining the premises involved and payments to the Association which were applied on the mortgage, but disallowed personal loans to Terry Druggan for items not connected with the property. The decree found that Mrs. Druggan was bound by the acts of her son Terry Druggan and the Phillipses; and that the deed to Parks was security for loans and advances in the sum of \$6,047.50 to Terry Druggan with the consent and acquiescence of Mrs. Druggan. The foregoing sum included \$500 paid by Parks on account of the mortgage to the Association. Counterplaintiff contends that the chancellor erred in not limiting the amount of Parks's lien to the sum found due by the master, namely, \$500 and some other small items used on the premises, to the payment of which counterplaintiff raises no objection.

It is undisputed that Mrs. Druggan acquired title to the premises in question in 1921 and remained in possession for more than twenty years. Manifestly she had a valid title in 1940 when she secured a loan from the Association. If her son Terry Druggan acquired any interest in the premises it must necessarily have been after the execution of the mortgage. How or when such interest, if any, was acquired by him does not appear in the record.

Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* and *Agaricus bisporus* spores on the growth of *Agaricus bisporus*.

[illegible]

Mrs. Druggan denies that she authorized Edith Phillips to execute the deed to Parks. Nor is there any evidence tending to show that Mrs. Druggan authorized or empowered her son to encumber the premises with his personal obligations.

Since we hold that the deed from Edith Phillips to Parks is in fact a mortgage, it can take effect as a lien only at the time of delivery of the deed and for such sums as were advanced in payment of the mortgage indebtedness. See Freutel v. Schmitz, 299 Ill. 320. We think the master's finding as to the amount of Parks's lien in the sum of \$618.40 is correct and is supported by the evidence. Therefore that part of the decree allowing Parks's lien for \$6,047.50 is reversed. The decree is in all other respects affirmed.

For the reasons given, the decree is reversed ~~in part~~ and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED
WITH DIRECTIONS.

KILEY, P.J., AND FEINBERG, J., CONCUR.

45503

EULALIA McLAUGHLIN,

Plaintiff - Appellant,

v.

PAUL SCHWENDENER, JAMES HEALY and
CITY OF CHICAGO, Defendants,

and

JAMES HEALY,

Defendant - Appellee.

3451.A. 304²

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating a judgment entered by default on the ground that the service of process was defective in an action to recover damages for personal injuries.

The complaint for the alleged personal injuries sustained by plaintiff was filed on January 5, 1950. On the same day a summons was issued and the return of the sheriff shows service upon the defendant James Healy "by leaving a copy of the summons with Mrs. James Healy, wife of the defendant, at his residence on January 5, 1950." No appearance or answer was filed by defendant Healy.

March 31, 1950 defendant Healy was defaulted, and on June 22, 1950 a jury assessed the plaintiff's damages and a judgment was entered against Healy in the sum of fifteen thousand dollars. June 26, 1950 an execution was issued and, according to the sheriff's return, was served on Healy by leaving a copy of the writ with his wife at his residence on August 1, 1950.

September 20, 1950, Healy filed a petition praying that the judgment theretofore entered be vacated, and for leave to answer the complaint. Afterwards he filed an amended petition which alleged in substance that on January 5, 1950 the sheriff served the summons in controversy upon one Mary Calahan, a friend of the Healys, who placed it upon a trunk in the hallway of the Healy home, where it became lost; that no one informed the petitioner of the service of the summons until after the 11th day of September 1950; that neither Healy nor any person of his family ever received a copy of the summons by mail from the sheriff; that he had no knowledge of the entry of a final judgment against him; that an execution was also served upon Mary Calahan; that the first time Healy received notice of pendency of the personal injury action was on September 11, 1950 when a citation was served upon Mrs. Healy; and that he has a good and meritorious defense to the claim.

Plaintiff filed an answer denying that the sheriff made a false return and that defendant Healy had a meritorious defense.

The sole issue presented for determination is whether the sheriff's return has been impeached by clear and satisfactory evidence tending to show that the summons was not served on the defendant Healy.

Our Supreme Court has repeatedly held that the stability of judicial proceedings requires that the return of an officer be not set aside merely upon the uncorroborated

testimony of the person on whom the service was had, but only on clear and convincing evidence. (Stasel v. American Home Security Corp., 362 Ill. 350; Marnik v. Cusak, 317 Ill. 362.)

The evidence shows that at the time of the alleged service of the summons defendant Healy resided at 6030 South Dorchester Avenue, in the City of Chicago, Illinois, with his wife who was sixty years of age and suffered from arthritis; that Edna Manduca, a sister of Mrs. Healy, lived with the Healys for several years until the first day of June 1950 and that Mary Calahan visited at the Healy home once or twice a week for periods of from two to five hours during which she did housework and prepared meals for Mrs. Healy who was often bedridden.

The evidence also shows that a trunk about two feet wide and three feet long stood two or three inches from the wall near the front door of the Healy home; that newspapers, magazines, and mail received at the Healy home were some times placed upon the trunk, and that occasionally things placed there would slide off between the trunk and the wall.

Charles F. McEvoy, deputy sheriff, testified that on January 5 he went to the home of defendant Healy; that after ringing the door bell "somebody" responded and he inquired for Mrs. Healy; that when the door was opened the witness stated, "This is the deputy sheriff. Here is a summons for Mr. Healy"; that at that time another lady appeared and looked at the summons, whereupon the witness

asked if Mr. Healy was in the real estate business, and that when neither of the ladies responded to his question the witness left. He further testified that on August 11th when he served the execution "practically the same happened," a lady appeared at the door who had been washing her hair; that this lady was one of the ladies he saw at the Healy home on January 5, 1950 when he served the summons. This witness did not identify either of the persons as being members of the Healy family.

Mrs. Healy testified that on September 11, 1950 a colored man "came to the door with a folder and asked for Mrs. Healy"; that he presented her with a "folder" which she gave to her husband; that this was the first time she learned that an action had been instituted by the plaintiff against defendant Healy; that afterwards she talked with Mrs. Calahan who told her that a man gave her some papers while she was at the Healy home; that after talking with Mrs. Calahan she made a search behind the trunk where she found an execution, bill of costs, a newspaper, and some mail; that she was never served with a summons nor did she receive a copy thereof. The record shows that the document referred to by Mrs. Healy as a "folder" was later identified as a citation to discover assets.

Mary Calahan testified in substance that she was at the Healy home "after the holidays in January 1950"; that while there a man appeared at the door and asked her "if this is the Healy home," to which she replied "yes"; that when she received the paper which she later learned was a summons the telephone rang and she laid it on the trunk;

that she never told Mr. and Mrs. Healy about having received the paper, and that she "thought they would pick it up themselves."

Edna Manduca testified that she lived at the Healy home for a period of almost three years; that during this . . . period she was employed daily from 1 o'clock until 10:30 p.m.; that Mrs. Healy was crippled by arthritis and had difficulty using her legs, arms and hands; that she never saw Mrs. Healy wash her hair at home while she resided there; and that she had no knowledge of the plaintiff's action against defendant Healy.

From a careful reading of the record we think the evidence is ample to support a finding by the trial court that the return of the deputy sheriff is false, and warranted the relief prayed for in the petition.

The record shows that the order appealed from bears the word "approved" above the signatures of plaintiff's attorneys. Defendant Healy insists that this is a consent order and the appeal should therefore be dismissed. We think this contention is without merit. It is not disputed that there was a judicial determination after a full hearing of the issue of fact formed by the amended petition and answer and that the order represented the decision of the trial judge. In Nelson v. Nelson, 340 Ill. App. 463, the precise question was raised under identical circumstances and decided adversely to the contention here made by defendant Healy.

For the reasons given, the order is affirmed.

ORDER AFFIRMED.

KILEY, P.J. AND FEINBERG, J. CONCUR.

OK
G. L. Simon

207-28

145
K 9492

Abstract

Gen. No. 10522 Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT. 345 I.A. 406¹
OCTOBER TERM, A. D. 1951.

DONALD BUHR,)	
Plaintiff-Appellee,)	
vs.	)	Appeal from the
	)	Circuit Court of
EDWIN G. WILKENING,	)	Kankakee County,
Defendant-Appellant.	)	Illinois.

WOLFE,-- J.

Donald Buhr started a suit in a Justice of the Peace Court in Kankakee County, Illinois, against Edwin G. Wilkening to recover Five Hundred Dollars, which he contends was wrongfully obtained from him by the defendant; that no consideration whatsoever was given him for this amount. He was successful in the Justice of the Peace Court, and the defendant, Wilkening, perfected an appeal to the Circuit Court of Kankakee County. The case was there tried before the Court without a jury. The Court found the issues in favor of the plaintiff, assessed his damages at \$500.00, and the defendant has perfected an appeal to this Court.

The record discloses that the defendant was employed by the Kankakee Service Company to deliver oil and gasoline for that Company. The appellee, Buhr, was employed by the defendant

Abstract

Appendix No. 4.

Gen. No. 10522

IN THE

APPELLATE COURT OF ILLINOIS

3451A.406

SECOND DISTRICT.

OCTOBER TERM, A. D. 1951.

Appeal from the
Circuit Court of
Kankakee County,
Illinois.

Donald Buhr,
Plaintiff-Appellee,

vs.

Edwin G. Wilkening,
Defendant-Appellant.

WOLFE, -- J.

Donald Buhr started a suit in a Justice of the Peace Court in Kankakee County, Illinois, against Edwin G. Wilkening to recover five hundred dollars, which he contends was wrongfully obtained from him by the defendant; that no consideration whatsoever was given him for this amount. He was unsuccessful in the Justice of the Peace Court, and the defendant, Wilkening, perfected an appeal to the Circuit Court of Kankakee County. The case was there tried before the Court without a jury. The Court found the issues in favor of the plaintiff, assessed his damages at \$500.00, and the defendant has perfected an appeal to this Court.

The record discloses that the defendant was employed by the Kankakee Service Company to deliver oil and gasoline for that Company. The appellee, Buhr, was employed by the defendant

2.

to drive one of his trucks for the delivery of the products of the Kankakee Service Company. Buhr claims that Wilkening represented to him that he was the owner of the delivery route and proposed to sell it to him for \$500.00. The deal was made and the \$500.00 paid.

It is the contention of the defendant that he never represented to Buhr that he was the owner of this route, but that it was a good paying proposition, and that he offered to sell to Buhr his right in this delivery route, and let him take his place with the service company, and he, Buhr, would make money by it. Buhr was corroborated by Wilmer Boicken who purchased the other half interest in the route. It later developed that this route was divided and Buhr took one-half of it and Boicken took the other one-half, but that Wilkening had no interest at all in the route which he could sell, as he was simply an employee of the Kankakee Service Company. Buhr upon learning this, demanded the return of his \$500.00 and on the refusal of the defendant to repay it, this suit was instituted. The trial court filed a written memorandum of his finding, and in it he states, "There has been no defense to this complaint." The appellant now insists that this is reversible error; that there was a defense offered and that by making such a statement, the trial court placed upon the defendant the burden of proof in this case, which in law should be upon the plaintiff. We find no merit in this contention, as this is no part of the judgment, but no doubt the Court meant that there is no legal defense, as developed by the evidence in the case that there was no such defense against the plaintiff's action.

This case is one of fraud and deceit and before the

to drive one of his trucks for the delivery of the products of the Milwaukee Service Company. Burr claims that Willingham represented to him that he was the owner of the delivery route and proposed to sell it to him for \$500.00. The deal was made and the \$500.00 paid.

It is the contention of the defendant that he never represented to Burr that he was the owner of this route, but that it was a good paying proposition, and that he offered to sell to Burr his right in this delivery route, and let him take his place with the service company, and he, Burr, would make money by it. Burr was corroborated by Wilmer Holchen who purchased the route from Burr. It is further developed that this route was divided and Burr took one-half of it and Holchen took the other one-half, but that Willingham had no interest at all in the route which he could sell, as he was simply an employee of the Milwaukee Service Company. Burr upon learning this, demanded the return of his \$500.00 and on the refusal of the defendant to repay it, this suit was instituted. The trial court filed a written memorandum of its findings, and in it he stated, "There has been no defense to this complaint." The appellant now insists that this is reversible error, that there was a defense offered and that by making such a statement the trial court placed upon the defendant the burden of proof in this case, which in law should be upon the plaintiff. We find no merit in this contention, as this is no part of the argument, but no doubt the Court meant that there is no legal defense, as developed by the evidence in the case that there was no such defense against the plaintiff's action. This case is one of fraud and deceit and before the

3.

plaintiff would be entitled to recover, he must prove that there was a misrepresentation of a statement of fact made for the purpose of influencing the plaintiff, Buhr. This representation must be untrue. The person making the statement must know, or believe it untrue. The person to whom it was made must believe and rely upon the statement and the statement must be material to the case in question. A review of the evidence unquestionably shows that all of these requirements were proven by the plaintiff. The Court saw and heard the witnesses and was in a much better position to judge their credibility than a Court of review, and from a reading of the evidence as abstracted, this Court is firmly convinced that the trial court properly held that the plaintiff was entitled to recover from the defendant the \$500.00, which he had paid him for this truck route.

Judgment affirmed.

plaintiff would be entitled to recover, he must prove that there was a misrepresentation of a statement of fact made for the purpose of influencing the plaintiff, Burr. This representation must be untrue. The person making the statement must know, or believe it untrue. The person to whom it was made must believe and rely upon the statement and the statement must be material to the case in question. A review of the evidence unquestionably shows that all of these requirements were proven by the plaintiff. The Court saw and heard the witnesses and was in a much better position to judge their credibility than a Court of review, and from a reading of the evidence as abstracted, this Court is firmly convinced that the trial court properly held that the plaintiff was entitled to recover from the defendant the \$500.00, which he had paid him for this truck route. Judgment affirmed.

345 ILL. App.

2483

OK
JFK

Abstract

General No. 10530

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

345 I.A. 406²

October Term, A.D.1951

In Re Estate of)	
FREDERICK N. PECK, Deceased,)	
JULIAN C. RYER,	)	Appeal from the
	)	Circuit Court of
Appellant.	)	Du Page County.

Dove, P.J.

Julian C. Ryer filed his petition in the Probate Court of Du Page County setting forth in detail the services he had rendered as a lawyer in connection with the probate of the Will and the administration of the estate of Frederick N. Peck, deceased. His verified petition prayed for an order directing the administrator with the will annexed to pay him \$1750.00 for his legal services. Upon a hearing in the Probate Court, the prayer of the petition was denied and a like order/and judgment was entered upon an appeal to the Circuit Court and from that judgment the petitioner brings the record to this court for review.

The record discloses that appellant is a practicing lawyer, forty-nine years of age, with offices in Chicago. He represented Frederick N. Peck, as his attorney, during his lifetime and prepared Mr. Peck's Will, which, upon his death, he filed for probate. Ruth Hillman was named in said Will as executor, but she

ADMINISTRATIVE

January 1931

Report No. 1000

IN THE

COUNTY OF COOK, ILLINOIS

CHIEF DISTRICT

RECEIVED JAN. 1. 1931

Special Agent in Charge
Chicago, Ill.
To the Chief District

In the matter of
FREDERICK A. WILSON, deceased,
JULIAN C. WILSON,
Applicant.

Dear Sir:

Julian C. Wilson filed his petition in the Probate Court of Cook County setting aside in whole the will of the deceased and the administration of the estate of Frederick A. Wilson, deceased. His verified petition prayed for an order appointing the said petitioner as the will executor to pay his five per cent fee. Upon a hearing in the Probate Court, the prayer of the petition was granted and a life insurance policy was ordered to be paid to the Circuit Court and that judgment be rendered in favor of the record to this court for review.

The record discloses that applicant is a

lawyer, forty-nine years of age, with offices in Chicago. He

represented Frederick A. Wilson, as deceased, during his lifetime and prepared Mr. Wilson's will, which, upon his death, he filed for probate. Both Wilson was named as executor of the will, and the

refused to serve. Mr. Peck died August 30, 1946, and prior to September 9, 1946, appellant prepared the necessary petition to probate his Will. On January 9, 1947, the Will was duly admitted to probate and letters of administration with the will annexed were issued to Hattie Glos, and appellant represented her as her attorney until he was discharged by her in the fall of 1949.

A copy of the Will of Mr. Peck does not ^{appear} ~~appear~~ in the record. The testator at the time of his death was 84 or 85 years of age, had never married, and left no immediate family, his two brothers having predeceased him. The Will made a few specific bequests, including one of \$1000.00 to Herbert Strauschild which has not been paid. The gross value of the estate approximated \$12,000.00. May 5, 1947, was fixed as the day for the adjustment of claims, and on that day the claim of the undertakers, amounting to \$225.00, and a claim of Miss Glos for \$500.00 were allowed. In addition to these two claims, four other small claims, all aggregating \$130.01 were also filed and allowed.

Thereafter appellant prepared a petition to sell the real estate to pay debts, procured a decree, and, on November 28, 1947, the real estate was sold for \$6600.00 pursuant to the order of the Probate Court. This sale was duly approved on January 8, 1948. A month earlier, December 8, 1947, the Probate Court allowed appellant \$200.00 for his services as attorney, and this amount he received from the administrator with the Will annexed.

No further steps appear to have been taken in the administration of the estate. Sometime prior to October 24, 1949, Miss Glos employed other counsel to represent her and on that date wrote appellant requesting him to turn over to her new attorney all papers in his hands. In the spring of 1950, in obedience to

refused to serve. Mr. Beck died August 30, 1946, and prior to September 9, 1946, appellant prepared the necessary petition to probate his will. On January 8, 1947, the will was duly admitted to probate and letters of administration with the will annexed were issued to Battle Glos, and appellant represented her as her attorney until he was discharged by her in the fall of 1949.

A copy of the will of Mr. Beck does not appear in the record. The testator at the time of his death was 84 or 85 years of age, had never married, and left no immediate family, his two brothers having predeceased him. The will made a few specific bequests, including one of \$1000.00 to Herbert Stumpfle which has not been paid. The gross value of the estate approximated \$12,000.00. May 6, 1947, was fixed as the day for the adjustment of claims, and on that day the claim of the underwriters, amounting to \$225.00, and a claim of Miss Glos for \$500.00 were allowed. In addition to these two claims, four other small claims, all aggregating \$130.01 were also filed and allowed.

Thereafter appellant prepared a petition to sell the real estate to pay debts, procured a decree, and, on November 15, 1947, the real estate was sold for \$650.00 pursuant to the order of the Probate Court. This sale was duly approved on January 8, 1948. A month earlier, December 8, 1947, the Probate Court allowed appellant \$200.00 for his services as attorney, and this amount he received from the administrator with the will annexed.

No further steps appear to have been taken in the administration of the estate. Sometime prior to October 21, 1949, Miss Glos employed other counsel to represent her and on that date wrote appellant requesting him to turn over to her new attorney all papers in his hands. In the spring of 1950, in obedience to

an order of the Probate Court, appellant filed in that court an account.

Appellant's verified petition filed June 23, 1950, shows numerous conferences, telephone communications and letters written by appellant and letters received by him. It sets forth that he devoted approximately 144 hours in rendering the services for which he seeks compensation and avers that a reasonable allowance should be \$20.00 an hour. His counsel state that the only question presented for our consideration is whether upon this record appellant is entitled to any additional compensation and call our attention to the statute which provides: "The attorney for an executor, administrator, administrator to collect, guardian or conservator shall be allowed reasonable compensation for his services." (Ill. Rev. St. 1951, Chap. 3, Sec. 491.)

The record discloses that during the time appellant represented the administrator no inheritance tax proceedings were initiated and, as a result thereof, a penalty of \$138.76 was incurred which the estate will be obliged to bear. Upon the hearing in the Circuit Court, in response to the Court's query: "How about the inheritance tax?" appellant replied: "I had prepared an application for inheritance tax but had sidetracked it for some other matters." And in response to a further inquiry by the Court as to the cause of the delay in administering the estate, appellant answered: "It was just routine work; it was not anything pressing in any way. The real difficulty was trying to frame a bill to appoint a trustee under the trust and to get somebody to operate on that. I have been in touch with the father of these children and I could get no satisfaction from them. There was some delay, there is no doubt about that, but it is one of those

an order of the Probate Court, appellant filed in that court

an answer.

Appellant's verified petition filed June 23, 1930,

shows numerous communications, telephone conversations and letters written by appellant and letters received by him. It also shows that he devoted approximately 1 1/2 hours in preparing the services

for which he seeks compensation and avers that a reasonable

allowance should be \$20.00 an hour. His counsel states that the

only question presented for consideration is whether upon

this record appellant is entitled to any additional compensation

and call our attention to the statute which provides: "The

attorney for an executor, administrator, guardian or conservator

of an estate shall be allowed reasonable compensation

for his services." (Ill. Rev. Stat. 1927, Chap. 3, Sec. 491.)

The record discloses that during the time appellant

represented the administrator no allowance for expenses were

initiated and, as a result thereof, a penalty of 18.75 was

incurred which the estate will be obliged to bear. Upon the hear-

ing in the Circuit Court in response to the Court's query: "How

about the inheritance tax?" appellant replied: "I had prepared

an application for inheritance tax but had withdrawn it for

some other matter." And in response to a further inquiry of

the Court as to the cause of the delay in withdrawing the estate,

appellant answered: "It was just routine work; it was not important

pressing in any way. The real difficulty was failing to trans-

act to appoint a trustee under the trust and to get somebody to

operate on that. I have been in touch with the father of these

children and I could get no satisfaction from them. There was

some delay, there is no doubt about that, but it is one of those

matters that has drifted along without any real emergency of any kind, nobody was being injured in any way." The record does not show what the provisions of the Will were with reference to any trust, nor does it appear what appellant did, if anything, in connection with that phase of the administration of this estate.

In addition to the penalty which the estate incurred by reason of the failure of appellant to initiate inheritance tax proceedings, an additional \$210.00 has already been expended for premiums on the surety bond of the administrator which would not have been required had appellant proceeded to close this estate with reasonable diligence.

We have read this record. There has been an unreasonable and unexplained delay on the part of appellant in connection with the administration of this estate. The Probate Court of Du Page County was familiar with all the proceedings had and taken by appellant in connection with this estate, and that Court determined that he had been paid in full for the character of the service he rendered. The Circuit Court, upon the record we are reviewing, came to the same conclusion. In disposing of the issues presented by the instant petition, the Circuit Court said: "I have gone into this matter thoroughly and under the circumstances I do not think there should be any additional fees, in view of the delay and the extra cost and expense and the proposition that additional fees will have to be expended to close the estate."

Taking into consideration the size and character of this estate, the services appellant rendered, the unreasonable delay and the negligence disclosed by the record, the expense

matters that has drifted along without any real emergency of any kind, nobody was being injured in any way." The record does not show what the provisions of the Will were with reference to any trust, nor does it appear what applicant did, if anything, in connection with that phase of the administration of this estate.

In addition to the penalty which the estate incurred by reason of the failure of applicant to initiate proceedings for proceedings, an additional \$10.00 was already been awarded for expenses on the surety bond of the administrator which would not have been required had applicant proceeded to close this estate with reasonable diligence.

He has not this record. There has been an investigation and explanation made on the part of applicant in connection with the administration of this estate. The Probate Court of the State County was familiar with all the proceedings and after by applicant in connection with this estate, and that Court determined that he had been paid in full for the character of the service he rendered. The Circuit Court, upon the record he was reviewed, came to the same conclusion. In disposing of the issues presented by the first petition, the Circuit Court said: "I have gone into this matter thoroughly and under the circumstances I do not think there should be any additional costs, in view of the delay and the extra cost and expense and the proposition that additional fees will have to be assessed to close the estate."

Taking into consideration the size and character of this estate, the various applicant rendered, the unnecessary delay and the negligence disclosed by the record, the expense

the estate has suffered and will suffer occasioned by this negligence and delay, together with the fact that additional attorney fees have necessarily been incurred because of this delay and negligence inclines us to the opinion that the Probate and Circuit Courts did not err in refusing to allow appellant any additional compensation.

The judgment of the Circuit Court of Du Page County will, therefore, be affirmed.

Judgment affirmed.

the estate has suffered and will suffer occasioned by this
negligence and delay, together with the loss of additional
attorney fees have necessarily been incurred because of this
delay and negligence insofar as to the extent that the
Trust and Charles O'Connell did not act in refusing to allow
payment of any additional compensation.
The judgment of the Circuit Court of St. Paul County
will, therefore, be affirmed.

Judge affirmed.

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1951

Appeal from the Circuit Court of Lake County, Illinois	KARL NAGEL, Plaintiff and Counter- Defendant-Appellee, vs. CAROL WAKE, formerly Mrs. J. A. DONNELLY, Defendant and Counter- Claimant-Appellant.
--	--

Dove, P. J.

On October 28, 1947, the plaintiff, Karl Nagel, wrote the defendant as follows: "I, Karl Nagel, agree to furnish all labor and material to complete the following items on your proposed residence at Vernon Township, Lake County, Illinois:

Entire excavating and backfilling (\$30.00), entire concrete work (\$2,500.00), entire carpenter work (\$10,050), entire plumbing, app. (\$2,200.00), entire electrical work, less fixtures (\$75.00), entire plastering (\$2,360.00), entire flashing and gutters (\$450.00), entire heating (\$1400.00), entire brick work, app. (\$1,500.00), master bath tile work (\$300.00), all required

steel (\$190.00), exterior painting only (\$950.00), the total sum of \$22,975.00, (Twenty two thousand and nine hundred seventy five dollars). Plus five percent for supervision of all trades through entire job to completion. Agreement, \$22,975.00, plus supervision fee \$1,149.00 is \$24,124.00 for complete residence as stated above, I will allow you \$125.00 for finished hardware. Owner shall furnish the shutters and wrought iron work. All the above to be done by thoroughly experienced and accredited craftsmen. Yours respectfully, Karl Nagel." This instrument was received by the defendant, and she noted her acceptance thereon. Thereafter, pursuant to said agreement, a dwelling-house was constructed under the supervision of Mr. Nagel, and in January, 1949, Mrs. Donnelly, now Mrs. Carol Blake, moved into it.

On December 20, 1949, Nagel filed the instant complaint against Mrs. Blake, consisting of two counts. Count One alleged the making of the contract, averred that the plaintiff had performed his part and that, on the basis of time and material furnished, plaintiff had earned \$12,217.30 and had received from the defendant \$10,669.23, leaving a balance of \$1,548.07 due the plaintiff from the defendant and for that amount plaintiff demanded judgment. Count Two likewise alleged the making of the contract, the performance by the plaintiff, and the payments by the defendant and averred that the balance due the plaintiff from the defendant under the contract amounted to \$1,548.07, but this count alleged that a balance on said account in the amount of \$1500.00 was struck and acknowledged by the parties on or about October 18, 1949, and, therefore, plaintiff prayed judgment upon an account stated for said sum of \$1500.00.

at \$100.00 (interior painting only) (1930-31), and costs
of \$20,000.00 (interior painting and other material costs,
five folios). The five folios for supervision of all work
through entire job to completion. Agreement, \$2,000.00, plus
supervision fee of \$1,140.00 in 1931, 1932 for complete repairs
as stated above. I will allow you \$150.00 for finished work-re-
pairs. I will furnish the materials and brought from work. All the
above to be done by thoroughly experienced and established trades-
men. Yours respectfully, Earl Nagel. Note: Plaintiff was
satisfied by the defendant, and was noted her cooperation thereon.
Thereafter, pursuant to said agreement, a dwelling house was
constructed under the supervision of Mr. Nagel, and in January,
1932, Mrs. Nagel, now Mrs. Carol Nagel, moved into it.
On December 30, 1934, Nagel filed the instant complaint
against Mrs. Bish, consisting of two counts. Count one alleged
the making of the contract, averred that the plaintiff had per-
formed his part and that, on the basis of time and material
furnished, plaintiff had earned \$14,000.00 and had received from
the defendant \$1,000.00, leaving a balance of \$13,000.00 due the
plaintiff from the defendant and for that amount plaintiff demanded
judgment. Count two likewise alleged the making of the contract,
the performance by the plaintiff, and the payment by the defendant
and averred that the balance due the plaintiff from the defendant
under the contract amounted to \$1,248.07, and that count alleged
that a balance on said account in the amount of \$100.00 was owing
and acknowledged by the parties on or about October 18, 1934, and
therefore, plaintiff prayed judgment upon an account stated for
said sum of \$100.00.

The defendant answered the complaint admitting the execution of the contract but denied the other material allegations of both counts. She also filed a counterclaim against the plaintiff and, as amended, averred that after the parties had entered into the contract as alleged in both counts of the original complaint, the counter-defendant immediately breached said contract as he was unable financially to procure materials and supplies with which to proceed and that counter-plaintiff did purchase such supplies and materials so that counter-defendant could proceed with said contract; that in the fall of 1949 the parties agreed that counter-plaintiff would pay the sum of \$1500.00 provided counter-defendant made right the defective plumbing deficiencies and corrected whatever was wrong with the septic tank and the tiling leading thereto. Counter-plaintiff further averred that she did not know at that time that counter-defendant had failed to install rock-wool insulation in the walls of the first floor of said dwelling although he had agreed to do so; that the entire construction of the septic tank was faulty; that the basement floor was improperly constructed; that there were leaks in the roof which she was required to repair all to her damage, which damage aggregates \$2500.00, and for this amount she demanded judgment against counter-defendant. The reply of the counter-defendant to the counterclaim was a denial of all of its allegations. The issues thus made by the pleadings were submitted to the court without a jury resulting in a judgment in favor of the plaintiff and against the defendant for \$1500.00. The court found the issues raised by the counterclaim^{and reply} in favor of the counter-defendant /~~counterclaim~~ and an appropriate judgment was entered upon that finding. The record is brought to this court for review by an appeal by the ~~xxxxxxx~~ defendant.

The defendant answered the complaint admitting the

execution of the contract but denied the other material

allegations of both counts. She also filed a counterclaim

against the plaintiff and, as amended, averred that after the

parties had entered into the contract as alleged in both counts

of the original complaint, the counter-defendant immediately

presented said contract as he was unable financially to procure

materials and supplies with which to proceed and that counter-

plaintiff had purchased such supplies and materials as that counter-

defendant could procure with said contract; that in the fall of

1949 the parties agreed that counter-plaintiff would pay the sum

of \$1500.00 provided counter-defendant made right the defective

plumbing deficiencies and corrected whatever was wrong with the

apartment and the plumbing thereat. Counter-plaintiff

further averred that she did not know at that time that counter-

defendant had failed to install rock-wool insulation in the walls

of the first floor of said building although he had agreed to do

so; that the entire construction of the apolo ten was faulty;

that the basement floor was improperly constructed; that there

were leaks in the roof which she was required to repair all to her

damage, which damage aggregates \$2500.00, and for this amount she

demanded judgment against counter-defendant. The reply of the

counter-defendant to the counterclaim was a denial of all of its

allegations. The issues thus made by the pleadings were submitted

to the court without a jury resulting in a judgment in favor of

the plaintiff and against the defendant for \$500.00. The court

and reply

found the issues raised by the counterclaim in favor of the

counter-defendant

\xxxxxxxxx and an appropriate judgment was entered upon the

finding. The record is brought to this court for review by an

appeal by the xxxxxxxx defendant.

Counsel for appellant concedes that the evidence shows that there was a discussion between the parties concerning the amount due appellee from appellant and that at the conclusion of the discussion appellant agreed to pay appellee an amount less than appellee claimed but insists that such promise was conditioned upon appellee correcting the defects in the installation of the plumbing and the septic tank; that the evidence discloses that these defects were never corrected and, therefore, the trial court erred in rendering any judgment against appellant. Counsel argue that the evidence on behalf of appellee, with its most favorable inferences, simply discloses that there was a promise on behalf of appellant to pay less than some greater unascertained amount which appellee claimed to be due; that the promised payment has not been made and, therefore, all that is shown is an unenforcible, unexecuted attempt to compromise.

The evidence discloses that appellee is a general building contractor and, after his offer of October 28, 1947, was accepted by appellant, certain blue prints, plans, and specifications were furnished him and he undertook the construction of a dwelling house in accordance with said blue prints, plans, and specifications. The house was constructed, and in January, 1949, appellant moved in. Appellee testified that in October, 1949, he had a meeting with appellant, at which time he submitted to her figures to the effect that there had been expended on certain items which went into the construction of the house \$11,816.30 with credits to which she was entitled, aggregating \$10,639.23, leaving a balance of \$1177.07 due him, together with the further sum of \$200.00 for brick work, \$75.00 for drain tile, and \$126.00 for tile work in the bathroom, making a total of \$1578.07 against which she was entitled to a credit of \$30.00 for asphalt tile bathroom floor, thus leaving a balance due appellee of \$1548.07. In addition there was an unpaid balance of \$697.50 due N. A. Frantz, plumber. Appellee testified that he did

Conceded for appellant conceding that the evidence shows

that there was a discussion between the parties concerning the amount due appellee from appellant and that at the conclusion of the discussion appellee agreed to pay appellee an amount less than appellee claimed but insists that such promise was conditioned upon appellee correcting the defects in the installation of the plumbing and the septic tank; that the evidence discloses that these defects were never corrected and, therefore, the trial court erred in rendering any judgment against appellant. Counsel argues that the evidence on behalf of appellee, with its most favorable inference, simply discloses that there was a promise on behalf of appellant to pay less than some greater unascertained amount which appellee claimed to be due; that the promised payment has not been made and, therefore, all that is shown is an unenforceable, unexecuted attempt to compromise.

The evidence discloses that appellee is a general contractor and, after his firm of October 28, 1947, was accepted by appellant, certain blue prints, plans, and specifications were furnished him and he undertook the construction of a dwelling house in accordance with said blue prints, plans, and specifications. The house was constructed, and in January, 1948, appellee moved in. Appellee testified that in October, 1948, he had a meeting with appellant, at which time he submitted to her figures as to the effect that there had been expended on certain items which went into the construction of the house \$11,816.30 with credits to which she was entitled, aggregating \$10,639.42, leaving a balance of \$1,176.88 due him, together with the further sum of \$200.00 for brick work, \$75.00 for drain tile, and \$125.00 for tile work in the bathroom, making a total of \$1,576.88 against which she was entitled to a credit of \$30.00 for repair tile bathroom floor, thus leaving a balance due appellee of \$1,546.88. In addition there was an unpaid balance of \$237.50 due W. A. Francis, plumber. Appellee testified that he did

not have the Frantz plumbing bill with him the first time he discussed settlement with appellant in October, 1949, but did have it with him when he returned to her home a week later accompanied by Samuel Smith. Mr. Smith testified that appellant stated at that time that the only thing that was wrong with the house was that the floor around the fireplace had buckled and the front door didn't close very easily. About a week later appellee, Smith, and Frantz, the plumber, were again at appellant's home and there discussed with appellant a settlement of their accounts. According to the testimony of appellee, as abstracted, this is what occurred: "On the date of the final conversation Mr. Smith and Mr. Frantz were with me. We sat down and went through this bill and came to an agreement allowing Mrs. Blake \$345.00 on my bill and \$397.00 on Mr. Frantz' bill in order to settle the claim and get the thing over. Mrs. Blake did not complain of my work. She said she would pay the amount of \$1500.00 on Sunday. She told me to come over and pick up the check. On Saturday night Mr. Blake called me and said he did not get the money for the second mortgage and to come over Tuesday and he would pay me then. Monday night he called and said I should come over the latter part of the week and I would be paid then. I did not see Mrs. Donnelly after that meeting. I did not go over the latter part of the week. I got another call from Mr. Blake. Four calls from him. He did not make any complaints. No amount of the \$1500.00 has been paid."

Samuel Smith also testified as to what occurred at this meeting. He said: "Mr. Frantz, Mr. Nagel and I came out there in the daytime. Mr. Nagel said he was anxious to get his money. We

not have the Trantz plumbing bill with him the first time he
discussed a settlement with appellant in October, 1942, but did
have it with him when he returned to her home a week later
accompanied by Samuel Smith. Mr. Smith testified that appellant
stated at that time that the only thing that was wrong with the
house was that the floor around the fireplace had cracked and
the front door didn't close very easily. About a week later
appellee, Smith, and Trantz, the plumber, were again at appellant's
home and there discussed with appellant a settlement of their
accounts. According to the testimony of appellee, as summarized,
this is what occurred: "On the date of the final conversation
Mr. Smith and Mr. Trantz were with me. We sat down and went
through this bill and came to an agreement allowing Mr. Trantz
\$45.00 on my bill and \$97.00 on Mr. Trantz' bill in order to
settle the claim and get the thing over. Mr. Trantz did not cor-
plain of my work. She said she would pay the amount of \$100.00
on Sunday. She told me to come over and get the check. On
Saturday night Mr. Trantz called me and said he did not get the
money for the second mortgage and to come over Tuesday and he would
pay me then. Monday night he called and said I should come over
the latter part of the week and I would be paid then. I did not
see Mrs. Donnelly after that meeting. I did not go over the
latter part of the week. I got another call from Mr. Trantz. He
called from him. He did not make any complaints. He wanted of the
\$100.00 has been paid."

Samuel Smith also testified as to what occurred at this
meeting. He said: "Mr. Trantz, Mr. Smith and I came out there in
the daytime. Mr. Trantz said he was anxious to get his money. We

went over all the items. Mrs. Blake said if he would settle for \$1500.00 she would pay it. This was \$650.00 less than the bill. Mr. Nagel said he was in need of the money and was tired of waiting for it and would take it. She said she didn't have the check right there, that Mr. Nagel could come over Sunday and pick up the check. The way they got around to the \$1500.00 they each knocked off about \$350.00 of their individual contract. Mr. Nagel reduced his bill around \$300.00 or \$350.00. She did mention the bathroom faucet and he said he would put in a new stem, and nothing else was said. It was just that she didn't have the check and that he should come over Sunday and pick it up."

M. A. Frantz, who was also present on this occasion, testified that he was a master plumber and in 1947 and 1948 did some plumbing on the home of appellant and continued: "I was hired by Karl Nagel who was the general contractor. In October, 1949, I went to the home of Mrs. Blake with Mr. Nagel and Mr. Smith to settle up accounts. I was attempting to collect my bill at that time. We sat around the table, the four of us. Mrs. Blake said she had a lot of trouble during the time this was under construction. I told her it is too bad, but this was my bill and it was ~~still and it was still~~ ^{I agreed} according to my contract with Mr. Nagel and my bill was \$697.00 and I agreed to settle for \$300.00. There was a faucet in the bathroom that was supposed to be fixed, and I went over one morning and put in a new stem. Mrs. Blake said she was satisfied with my bill and she was satisfied with Nagel's bill. \$1500.00 was agreed on as what she would pay."

Appellant testified that there were two meetings in September, 1949; that the first meeting was when appellee and

went over all the items. Mrs. Blake said it was worth settling for
1500.00 and would pay it. This was 1937.00 less than the bill.
Mr. Nagel said he was in need of the money and was willing to settle
for it and would pay it. The bill was 1500.00 and he would pay it.
right then. The bill was 1500.00 and he would pay it.
the other. The bill was 1500.00 and he would pay it.
knocked off about 1500.00 of their original contract. Mr. Nagel
received his bill around 1937.00 or 1938.00. The bill was on the
patron's farm and he said he would not in a new state, and nothing
else was said. It was just that she didn't have the money and
that he should come over Sunday and pick it up.
M. A. Tranta, who was also present on this occasion,
testified that he was a master plumber and in 1947 and 1948 did
some plumbing on the home of applicant and respondent. "I was
hired by Karl Nagel who was the general contractor. In October,
1948, I went to the home of Mrs. Blake with Mr. Nagel and Mr.
Smith to settle my account. I was attempting to collect my bill
at that time. We sat around the table, the four of us. Mrs. Blake
said she had a lot of trouble during the time she was under con-
struction. I told her it is too bad, but this was my bill and it
I agreed
was xxxxxxxxxxxxxx according to my contract with Mr. Nagel and
my bill was 1037.00 and I agreed to settle for 1500.00. There was
a faucet in the bathroom that was supposed to be fixed, and I went
over one morning and put in a new faucet. Mrs. Blake said she was
satisfied with my bill and she was satisfied with Mr. Nagel's bill.
1500.00 was agreed on as what she would pay."
Appellant testified that there were two meetings in
September, 1948; that the first meeting was when applicant and

Smith came to her home about noon. As abstracted, she continued: "I said that things were not right and must be corrected, such as floors and doors and several different things, also about the plumbing and carpenter work. He said he would repair the work and I said the plumbing was bad and that there was a very bad odor around the septic tank that must be repaired. There were faucets in the upstairs shower that had been reversed and people either scalded or froze themselves. Conversation also included the freezing of the house previous to occupancy, which caused the downstairs faucets to leak and that the wall would have to be ripped out. Mr. Nagel said he would come back and do the repairs and that he and Mr. Frantz would get together. The next meeting took place in a week or ten days with Frantz, Smith, Nagel and myself present. Then I mentioned the plumbing. Frantz said he would fix it. He did fix it the next day. The next day he dug around the septic tank. He put some black paste on the faucet. I watched him while he did it. He did not put a new stem on it. In the second conversation we agreed on \$1500.00 and I said I would pay but definitely wanted the plumbing situation corrected. We agreed and I said I would pay if that was fixed. They did not agree to fix the upstairs bath. I mentioned the septic tank and Mr. Frantz came back the next day and dug around it." On cross examination appellant testified: "I said I would pay \$1500.00 provided the faucet was fixed in the downstairs bathroom and we found out what was wrong with the condition of the septic tank, but the septic tank wasn't repaired until the next February. I think it is correct that I said I would pay \$1500.00 on the following

Smith came to her home about noon. As expected, she continued: "I said that things were not right and must be corrected, such as floors and doors and several different things, also about the plumbing and carpenter work. He said he would repair the work and I said the plumbing was bad and that there was a very bad odor around the septic tank that must be repaired. There were faucets in the upstairs shower that had been reversed and people either scalded or froze themselves. Conversation also included the freezing of the house previous to occupancy, which caused the downstairs faucets to leak and that the well would have to be ripped out. Mr. Engel said he would come back and do the repairs and that he and Mr. Frantz would get together. The next morning took place in a week or ten days with Frantz, Smith, Engel and myself present. Then I mentioned the plumbing. Frantz said he would fix it. He did fix it the next day. The next day he dug around the septic tank. He put some black paste on the faucet. I watched him while he did it. He did not put a new stem on it. In the second conversation we agreed on \$1500.00 and I said I would pay but definitely wanted the plumbing situation corrected. We agreed and I said I would pay if that was fixed. They did not agree to fix the upstairs bath. I mentioned the septic tank and Mr. Frantz came back the next day and dug around it. On cross examination applicant testified: "I said I would pay \$1500.00 provided the faucet was fixed in the downstairs bathroom and we found out what was wrong with the condition of the septic tank, but the septic tank wasn't repaired until the next February. I think it is correct that I said I would pay \$1500.00 on the following

Sunday and my husband called on Saturday night."

Whether the conferences in September or October, 1949, between the parties hereto resulted in an account stated is a question of fact. Appellee denied that appellant's promise to pay the \$1500.00 was contingent upon any further work being done and he was corroborated by Smith and Frantz. Following the discussions which resulted in appellant's agreement to pay \$1500.00, the evidence discloses that at no time did appellant contact appellee or Frantz in connection with the items set forth in her counterclaim and never made any complaint to either of them. All she did was to disregard her admitted promise to pay.

During the course of the hearing, the learned and experienced trial judge stated he believed the testimony of Smith, Frantz and appellee and found there was an account stated and rendered judgment accordingly. The court further stated that he did not believe the testimony of appellant and, accordingly, found the issues made by the counter-claim and reply in favor of the counter-defendant. We have read the testimony found in this record as abstracted and believe the conclusions arrived at by the trial court are fully sustained by the evidence.

From an examination of the record, we are satisfied that appellant did not agree to pay \$1500.00 contingent upon something further to be done by appellee. Nor do we think there is any merit in appellant's contention that the evidence simply discloses an unexecuted attempt to compromise the liability of appellant to appellee. "A new promise by a debtor to his creditor, or a new agreement between them, either written or oral, may itself, as distinguished from its performance, be accepted by the creditor in

Monday and my husband called on Saturday night."

Whether the conference in September or October,

1949, between the parties hereto resulted in an account stated is a question of fact. Appellee denied that appellant's promise to pay the \$1000.00 was contingent upon any further work being

done and he was corroborated by Smith and Trantz. Following

the disclosure which resulted in appellant's agreement to pay

\$1500.00, the evidence discloses that at no time did appellant

contact appellee or Trantz in connection with the items set forth

in her counterclaim and never made any complaint to either of

them. All she did was to disregard her admitted promise to pay.

During the course of the hearing, the learned and

experienced trial judge stated he believed the testimony of Smith,

Trantz and appellee and found there was an account stated and

therefore judgment accordingly. The court further stated that he

did not believe the testimony of appellant and, accordingly,

found the answer made by the counter-claim and reply in favor of

the counter-defendant. We have read the testimony found in this

record as abstracted and believe the conclusions arrived at by

the trial court are fully sustained by the evidence.

From an examination of the record, we are satisfied that

appellee did not agree to pay \$1000.00 contingent upon something

further to be done by appellee. Nor do we think there is any

error in appellant's contention that the evidence simply discloses

an unrecalled attempt to reimburse the liability of appellee to

appellee. "A new promise by a debtor to his creditor, or a new

agreement between them, either written or oral, may itself, as

discriminated from its performance, be accepted by the creditor in

satisfaction of a previous claim or demand, whether the latter is founded in contract or in tort, and where a promise or agreement is so accepted in satisfaction it extinguishes the claim or demand previously existing, and constitutes a good accord and satisfaction, whether or not it is actually carried out or performed. In case of nonperformance of the new promise or agreement the creditor's remedy is upon it, for its breach, and not upon the original claim or demand, which is not revived by the nonperformance of the new promise, and no right to recur to which arises or exists by reason of such breach." (1 C.J.S., Accord and Satisfaction, Sec. 22, pp. 489-490.)

The judgment appealed from is warranted by the law and the evidence and that judgment will, therefore, be affirmed.

Judgment affirmed.

satisfaction of a previous claim or demand, whether the latter
is founded in contract or in tort, and where a promise or agree-
ment is so accepted in satisfaction it extinguishes the claim or
demand previously existing, and constitutes a good discharge and
satisfaction, whether or not it is actually carried out or
forfeited. In case of non-performance of the new promise or agreement
the creditor's remedy is upon it, for its breach, and not upon the
original claim or demand, which is not revived by the non-performance
of the new promise, and no right to recover to which either or either
by reason of such breach." (1 C.J.S., 400, and citation).

Sec. 27, pp. 183-400.

The judgment appealed from is warranted by the law and
the evidence and that judgment will, therefore, be affirmed.

Very respectfully,
Your obedient servant,
J. H. H. H.

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1951

EMIL SOLAZZI,

Plaintiff-Appellee,

vs.

LOUIS CASOLA and
OLIVE CASOLA,

Defendants-Appellants.

Appeal from the
Circuit Court of
Winnebago County.

Dove, P.J.

The complaint in this case alleged that on or about May 10, 1949, the plaintiff purchased from defendants certain residential property in Rockford for \$21,000.00; that the defendants had theretofore leased to John F. Paquin the lower apartment thereof for an agreed rental of \$100.00 per month commencing November 20, 1948, which lease was in full force and effect on May 10, 1949; that the rentals specified in said lease were paid in advance by the tenant, Paquin, to the defendants; that as an inducement to the plaintiff to purchase said premises, the defendants represented to the plaintiff that said rental of \$100.00 per month was a valid, existing rental under the rental regulations of the United States of America and that the defendants had complied with existing rental regulations then in force; that at the time of making such representations, the defendants

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

343 111 407

October Term, A. D. 1941

WILL BEARD, Plaintiff-Appellee, vs. LOUIS ORSOLA and OLIVIA ORSOLA, Defendants-Appellants.	Appeal from the Circuit Court of Winnebago County.
---	--

Date, 7.3.

The complaint in this case alleged that on or about May 10, 1941, the plaintiff purchased from defendant certain residential property in Rockford for \$11,000.00; that the defendant had therefore leased to John F. Padua the lower apartment thereof for an agreed rental of \$100.00 per month commencing November 20, 1940, which lease was in full force and effect on May 10, 1941; that the rentals specified in said lease were paid in advance by the tenant, Padua, to the defendant; that as an inducement to the plaintiff to purchase said premises, the defendant represented to the plaintiff that said rental of \$100.00 per month was a valid, existing rental under the rental regulations of the United States of America and that the defendant had complied with existing rental regulations then in force; that at the time of making such representations, the defendant

made were submitted to a jury resulting in a verdict in favor of the plaintiff and against the defendants for \$700.00. After overruling a motion for a new trial, judgment was rendered upon the verdict and the defendants appeal.

The record discloses that on April 18, 1949, appellee executed a written instrument by the provisions of which he offered to purchase a two family apartment building located in Rockford and which belonged to appellants for \$21,000.00. Their offer recited that the lower apartment was leased until November 22, 1949, at \$100.00 per month. This offer was accepted by appellants, and on May 10, 1949, the purchase was completed and in the settlement between the parties, the purchaser was credited with \$625.00, being rental which the sellers had collected in advance for the lower apartment for six months and one week from John Paquin, the tenant. The lease was assigned to appellee. By an agreement entered into between Paquin and appellee, Paquin vacated the lower apartment one month and one week prior to the expiration of his lease and appellee paid to him \$125.00 for the possession of the apartment at that time.

Subsequently, and on October 22, 1949, the United States brought suit against the parties to this suit in the District Court of the United States, Northern District of Illinois, to recover rentals received by the parties hereto over and above \$45.00 per month from and after April 1, 1949. That suit was settled and thereafter dismissed by stipulation of the parties upon appellee paying \$288.10 and appellants paying \$68.00 to the Treasurer of the United States. In defense of this proceeding, appellee incurred an attorney fee of \$75.00. The evidence further discloses that the property was under Federal rent control until July 31, 1950,

made were submitted to a jury resulting in a verdict in favor of the plaintiff and against the defendant for \$750.00. After overruling a motion for a new trial, judgment was rendered upon the verdict and the defendant's appeal.

The record discloses that on April 18, 1949, appellee

executed a written instrument by the provisions of which he offered to purchase a two family apartment building located in Chicago and which belonged to appellants for \$1,000.00. Their offer recited that the lower apartment was leased until November 15, 1949, at \$100.00 per month. This offer was accepted by appellants and on May 10, 1949, the purchase was completed and in the settlement between the parties, the purchase price was credited with \$250.00 being paid when the balance was collected in advance for the lower apartment for six months and one week from John J. J. the tenant. The lease was assigned to appellee. By an agreement entered into between J. J. and appellee, J. J. vacated the lower apartment one month and one week prior to the expiration of the lease and appellee paid to him \$150.00 for the possession of the apartment at that time.

Subsequently, and on October 22, 1949, the United States brought suit against the parties to this suit in the District Court of the United States, Northern District of Illinois, to recover the balance due by the parties hereto over and above \$450.00 per month from and after April 1, 1949. That suit was settled and thereafter dismissed by stipulation of the parties upon appellee paying \$288.10 and appellee giving \$100.00 to the Treasurer of the United States. In defense of this proceeding appellee introduced an attorney fee of \$75.00. The evidence further discloses that the property was under Federal rent control until July 31, 1950,

and that the maximum monthly rental under the O.P.A. regulations prior to July 31, 1950, was \$45.00 per month. It also appears from the evidence that appellee was informed by appellants and by their real estate agent that the rent of \$100.00 per month was a valid rent under the then existing rental regulations, and appellee testified that he would not have purchased said premises had he known that the rent ceiling was then \$45.00 per month.

Counsel for appellants argue that before a recovery can be had in this case it must appear that not only appellants made a representation to the effect that the Paquin lease was valid and that it complied with O.P.A. regulations, but that it must also appear that this statement was false, known to be false and made with the intent to deceive. Counsel insist that this lease was valid when made and continued to be until April 1, 1949, when this property was recontrolled by act of Congress and the rent ceiling reduced to the amount previously set when the property was under O.P.A. control. If this be true, appellant, Louis Casola, spoke recklessly and without regard to the truth when he stated, as testified to by appellee, that the Paquin lease was valid, that it complied with O.P.A. Regulations and that appellee would have no trouble about it. Appellants are chargeable with knowledge of the O.P.A. Regulations and the affirmation to the effect that this lease did comply with those regulations and that appellee would have no trouble about it were statements made without regard to the truth. We have read the record and believe the evidence found therein sustains the finding of the jury that the representations alleged to have been made by appellant, Louis Casola, in connection with the Paquin lease, were made, that they were false, that they were either known to have been false when made or were a positive assertion recklessly made without knowledge

and that the maximum monthly rental under the O.P.A. regulations
prior to July 31, 1950, was \$45.00 per month. I also express
from the evidence that appellee was informed by appellee and by
their real estate agent that the rent of \$100.00 per month was
a valid rent under the then existing rental regulations, and
appellee testified that he would not have purchased said property
had he known that the rent ceiling was then \$45.00 per month.
Counsel for appellee argues that before a property
can be sold in this case it must appear that not only appellee
made a representation to the effect that the rental lease was
valid and that it complied with O.P.A. regulations, but that it
must also appear that this statement was false, known to be
false and made with the intent to defraud. Counsel insists that
this lease was valid when made and continued to be until April 1,
1949, when this property was reclassified by act of Congress and
the rent ceiling reduced to the amount previously set when the
property was under O.P.A. control. It will be true, appellant,
Louis Gasol, spoke recklessly and without regard to the truth
when he stated, as testified to by appellee, that the rental lease
was valid, that it complied with O.P.A. regulations and that
appellee would have no trouble about it. Appellee is chargeable
with knowledge of the O.P.A. regulations and the allocation so the
effect that this lease did comply with those regulations and that
appellee would have no trouble about it says witnesses made with-
out regard to the truth. We have read the record and believe the
evidence found therein supports the finding of the jury that the
representations alleged to have been made by appellant, Louis
Gasol, in connection with the rental lease, were made, that they
were false, that they were either known to have been false when
made or were a positive assertion recklessly made without knowledge

of their truth and uttered in order to deceive appellee and that appellee believed those representations, relied upon them and purchased the property and suffered damages thereby. These are the essential elements appellee was required to prove. (Billstrom v. Triple Tread Tire Co., 220 Ill. App. 550). Counsel argue that because the tenant moved prior to the expiration of the lease and appellee moved in the lower apartment proves that appellee did not rely upon the statement regarding the amount this apartment rented for, in purchasing the property. Appellee testified he did, and counsel's argument that he did not is not persuasive.

It is next insisted by counsel for appellants that the record shows the payment of \$288.10 to the Treasurer of the United States by appellee was voluntarily made; that the invalidity of the Paquin lease was not determined and, therefore, the court erred in permitting appellee to show the payment of this amount in order to establish his damages. What the record shows is that on March 21, 1950, the attorney representing the plaintiff in the action pending in the District Court of the United States for the Northern District of Illinois and the attorneys representing the parties to this proceeding, who were the defendants in the Federal Court, entered into a stipulation which provided that the action in the Federal Court should be dismissed at the costs of the defendant, and the evidence shows that in order to bring about that dismissal appellee paid \$288.10 and appellants paid \$68.00 in full settlement thereof. There was no error in the admission of this evidence.

It is also insisted that the verdict is excessive and that the evidence does not sustain a verdict for \$700.00. We are inclined to agree with this contention. The actual damage proven

of their truth and uttered in order to deceive appellee and that appellee believed those representations, relied upon them and transferred the property and suffered damage thereby. These were the essential elements appellee was required to prove. (Pillitter v. Triple Trade Fire Ins. Co., 270 Ill. App. 550). Counsel

argues that because the tenant never paid to the expiration of the lease and appellee never in the lower court proved that appellee did not rely upon the statement regarding the amount this statement raised for in purchasing the property. Appellee testified as to his and counsel's argument that he did not is not persuasive.

It is next insisted by counsel for appellee that the record shows the payment of \$288.10 to the treasurer of the United States by appellee was voluntarily made; that the liability of the Federal Reserve was not determined and, therefore, the court erred in permitting appellee to show the payment of this amount in order to establish his defense. What the record shows is that on March 21, 1950, the attorney representing the plaintiff in the action pending in the District Court of the United States for the Northern District of Illinois and the attorney representing the parties to this proceeding, who were the defendants in the Federal Court, entered into a stipulation which provided that the action in the Federal Court should be dismissed at the costs of the defendant, and the evidence shows that in order to bring about that dismissal appellee paid \$288.10 and appellee paid \$22.00 in full settlement thereof. There was no error in the admission of this evidence.

It is also insisted that the verdict is excessive and that the evidence does not sustain a verdict for \$700.00. We are inclined to agree with this contention. The actual damage proven

by appellee consisted of \$288.10 paid to the Treasurer of the United States in settlement of the action to which appellee was a party in the Federal Court, together with \$75.00 paid by appellee to his attorney to represent him in that proceeding. These sums aggregate \$363.10. Appellee and the tenant mutually terminated the lease, and appellee moved into the lower apartment which Paquin had occupied. Appellee, therefore, sustained no loss after that time.

In reply to this contention, counsel for appellee insists that in addition to being compelled to refund rental overcharges and pay attorney fees incurred by virtue of the civil suit filed by the government, appellee is also entitled to recover the difference between the maximum rental for the lower apartment of said premises, being \$45.00 per month, and \$100.00 per month, as represented by appellants, until July 20, 1950, when the rent control regulations were lifted. Counsel argues that "it is common knowledge, of which courts and juries will take judicial notice, that property having a rental of \$100.00 per month is of greater value than property having a rental of \$45.00 per month . . . and in cases of fraud compensatory damages are given with more liberal hand by juries and their verdicts are less closely scanned than in cases based on contracts." Counsel then asks, "Can anyone successfully contend that the verdict of \$700.00 in this case is excessive?"

It is true the rent control regulations continued until July 20, 1950. The lease was for \$100.00 per month until November, 1949, and the rent ceiling was \$45.00 per month from April, 1949. Difference in the actual value of the lease and the represented value from the date of sale to the termination of the lease is the

by appellee consisted of \$200.00 paid to the Treasurer of the United States in settlement of the action of which appellee was a party in the Federal Court, together with \$22.00 paid by appellee to his attorney to represent him in that proceeding. These sums aggregate \$222.00. Appellee and the tenants mutually terminated the lease, and appellee moved into the lower apartment which therein had occupied. Appellee, therefore, sustained no loss after that time.

In reply to this contention, counsel for appellee insists that in addition to being compelled to vacate the premises and pay attorney fees incurred by virtue of the civil suit filed by the Government, appellee is also entitled to recover the difference between the maximum rental for the lower apartment of said premises, said \$200.00 per month, and \$22.00 per month, as represented by appellee, until July 22, 1942, when the rental payment was made. Counsel argues that it is common knowledge, of which courts and juries will take judicial notice, that property having a rental of \$200.00 per month is of greater value than property having a rental of \$22.00 per month. And in cases of such compulsory removal the given value is liberalized by juries and their verdicts are less closely scrutinized in cases based on contracts. "Whereas, it is the duty of the court to see that the value of the property is not unduly depreciated."

It is true that the rental regulations continued until July 22, 1942. The lease was for \$100.00 per month until November 1942, and the rent ceiling was \$42.00 per month from April, 1942. Difference in the actual value of the lease and the represented value from the date of sale to the termination of the lease is the

proper measure of damages. (Antle and Bro. v. Sexton, 137 Ill. 410.) Appellee's loss of rentals ceased when the lease terminated, and the lease terminated when he, appellee, moved into the lower apartment one month and one week before the lease terminated by its own provisions. Appellee, therefore, never suffered ^{any} ~~by~~ loss of rent after he moved into the lower apartment. He could not have suffered any loss of rental after the tenant, at the request of the owner, surrendered possession of the apartment to him, and he, the owner, moved into it.

According to the testimony of Mr. Casola, he did not know the property had been re-controlled on April 1, 1949, and first learned of it when he received a notice from the office of O.P.A. sometime after the sale of the property to appellee. The evidence found in this record, in our opinion, however, warranted a finding in favor of appellee, and he was entitled to recover his compensatory damages not to exceed \$363.10. The judgment of the trial court is, therefore, reversed and the cause is remanded with directions to enter an order that if appellee files a remittitur of \$336.90 within thirty (30) days after the mandate of this court is filed in the Office of the Circuit Clerk of Winnebago County, as provided by law, that then judgment will be rendered in favor of appellee and against appellants for \$363.10, and if no remittitur is so filed that then an order will be entered granting to appellants a new trial and for further proceedings not inconsistent with this opinion.

Judgment reversed and cause
remanded with directions.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

345 I.A. 408⁷

At a term of the Appellate Court, begun and held at
Ottawa, on Tuesday, the 2d day of October, in the year of
our Lord one thousand nine hundred and fifty-one, within
and for the Second District of Illinois:

Present -- Honorable FRANKLIN R. DOVE, Presiding Justice

Honorable BEN F. ANDERSON, Justice

Honorable FRED G. WOLFE, Justice

JUSTUS L. JOHNSON, Clerk

CLAYTON C. HARBECK, Sheriff

BE IT REMEMBERED, that afterwards, to-wit:

On January 8, 1952 the Opinion of the Court was
filed in the Clerk's Office of said Court, in the words and
figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS

- - -
SECOND DISTRICT
- - -

October Term, A.D. 1951

FLORENCE LONG,

Plaintiff-Appellee,

vs.

OWEN LONG,

Defendant-Appellant.

APPEAL FROM THE

CIRCUIT COURT OF

WINNEBAGO COUNTY.

Dove, P.J.

Appellee, Florence Long, filed a suit for divorce in the Circuit Court of Winnebago County charging her husband, Owen Long, the appellant, with extreme and repeated cruelty. An answer was filed denying the allegations of the complaint. In addition to a decree for divorce, appellee also sought the custody of their two children, alimony, support for the two children, attorney fees, the occupancy of the home which the parties owned in joint tenancy, and the use of the furnishings and furniture located in said home.

At the conclusion of the hearing appellee was awarded a decree of divorce on the ground of extreme and repeated cruelty, was granted the custody of the two children, subject to the right of appellant to visit the children at reasonable and seasonable times, together with the right to occupy, with the two children,

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

RESEARCH REPORT

NO. 1000

EXPERIMENTAL DATA	
1. Name of compound	2. Molecular weight
3. Physical constants	4. Chemical constants
5. Solubility	6. Other data

Summary of results: The compound was found to be a white, crystalline solid, melting at 100°C. It was soluble in water and in many organic solvents. The molecular weight was determined to be 100.0. The compound was identified as sodium chloride.

Conclusions: The results of the experiments indicate that the compound is sodium chloride. The physical and chemical properties are in good agreement with those of sodium chloride.

the home which the parties owned as joint tenants, also attorney fees in the sum of \$100.00, and monthly support for the two children in the sum of \$105.00, which support money for the children was made a lien on the appellant's interest in the home which they owned. The matter of alimony for the plaintiff was reserved for future determination.

To reverse this decree the defendant prosecutes this / appeal and contends that the evidence is ^{not} sufficient to support a divorce on the ground of extreme and repeated cruelty; that the court had no power to award to the appellee the use and occupation of the home which the parties owned as joint tenants; that the evidence did not justify the court in making the support payments for the children a lien on the interest of the appellant in the home; and, finally, that the support payments are unreasonably high under the facts and circumstances shown by this record.

The parties were married on May 30, 1939, and lived together until their separation on December 31, 1950. After the separation they occupied different rooms in the home. Their two children, Susan and Bruce, were of the ages of six and four, respectively, at the time of the filing of the complaint in January, 1951.

The evidence discloses that appellant had a chest of drawers in which he kept his private papers, and on September 22, 1949, he told his wife someone had been trying to open this box and asked her who did it. According to his testimony, she said she did not know. He then continued: "I tried to get it out of her and I did take hold of her arm and I admit I handled her with sufficient roughness to cause a bruise on her arm." Appellee testified that he was angry and grabbed her by the arm, pulled it behind her and twisted it, causing her considerable pain. On



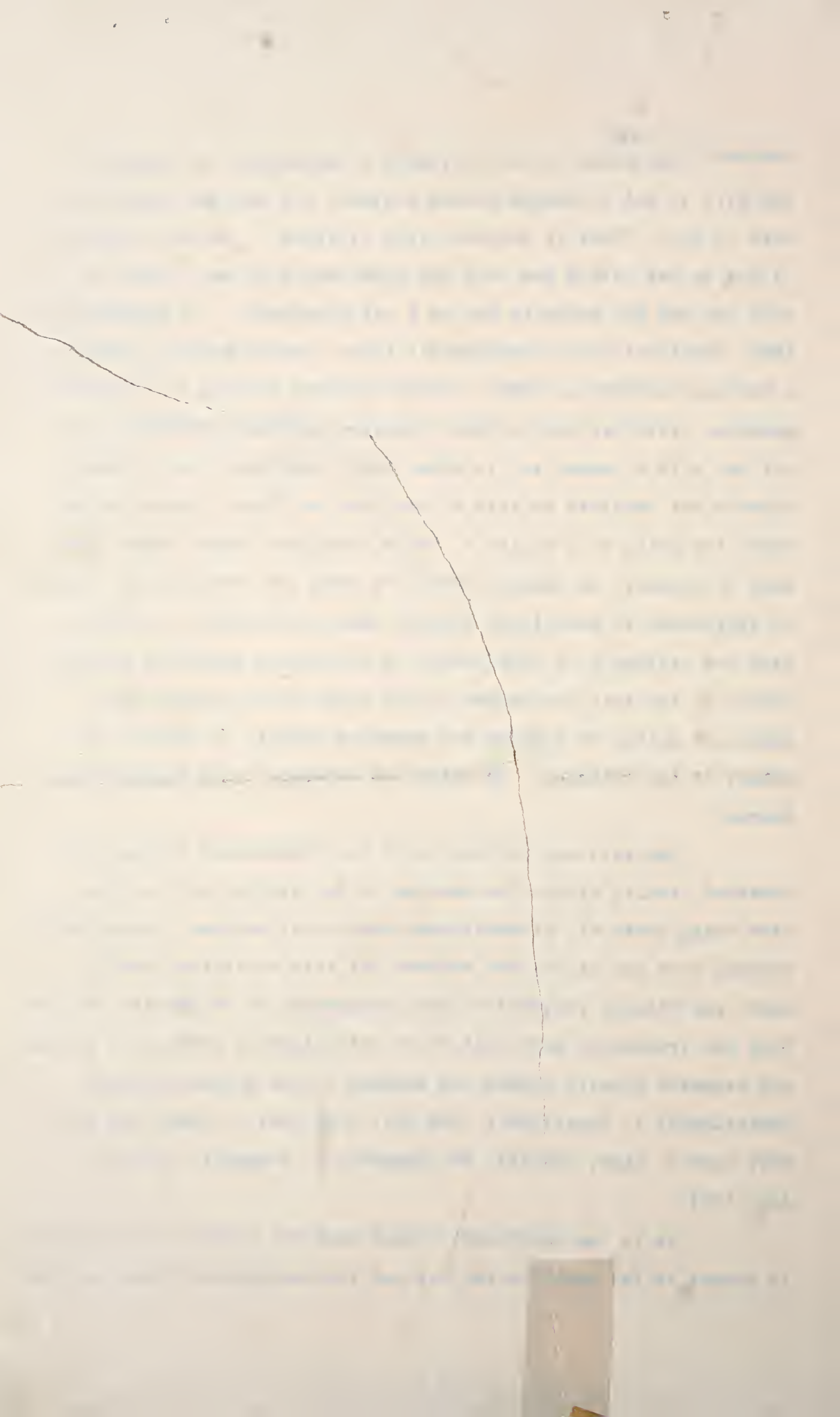
[The text on this page is extremely faint and illegible. It appears to be a multi-paragraph document with some section breaks. A large, irregular tear runs vertically down the right side of the page, starting from the middle and extending to the bottom.]

12, 1949,

October/ according to the testimony of appellant, he requested his wife to put a bandage around his hand, and when she refused he said to her: "That is not the right attitude." He then testified: "I got up and jerked her onto the floor and told her to get the hell out and get going as far as I was concerned." On December 31, 1950, appellant, with considerable force, pushed appellee against a chest of drawers in order to keep her from turning off the radio. Appellee testified that on this occasion appellant threatened to hit her with a hammer and to shoot her. Appellant denied these threats but admitted he said to her that he "didn't think she was worth the price of a bullet." While appellant admits these three acts of cruelty, he insists that they were not sufficiently violent or aggravated to constitute cruelty under our statute. We have read the testimony in this record on this issue carefully and are unable to say that the decree of the trial court finding the appellant guilty of extreme and repeated cruelty is against the weight of the evidence. We think the evidence fully supports the decree.

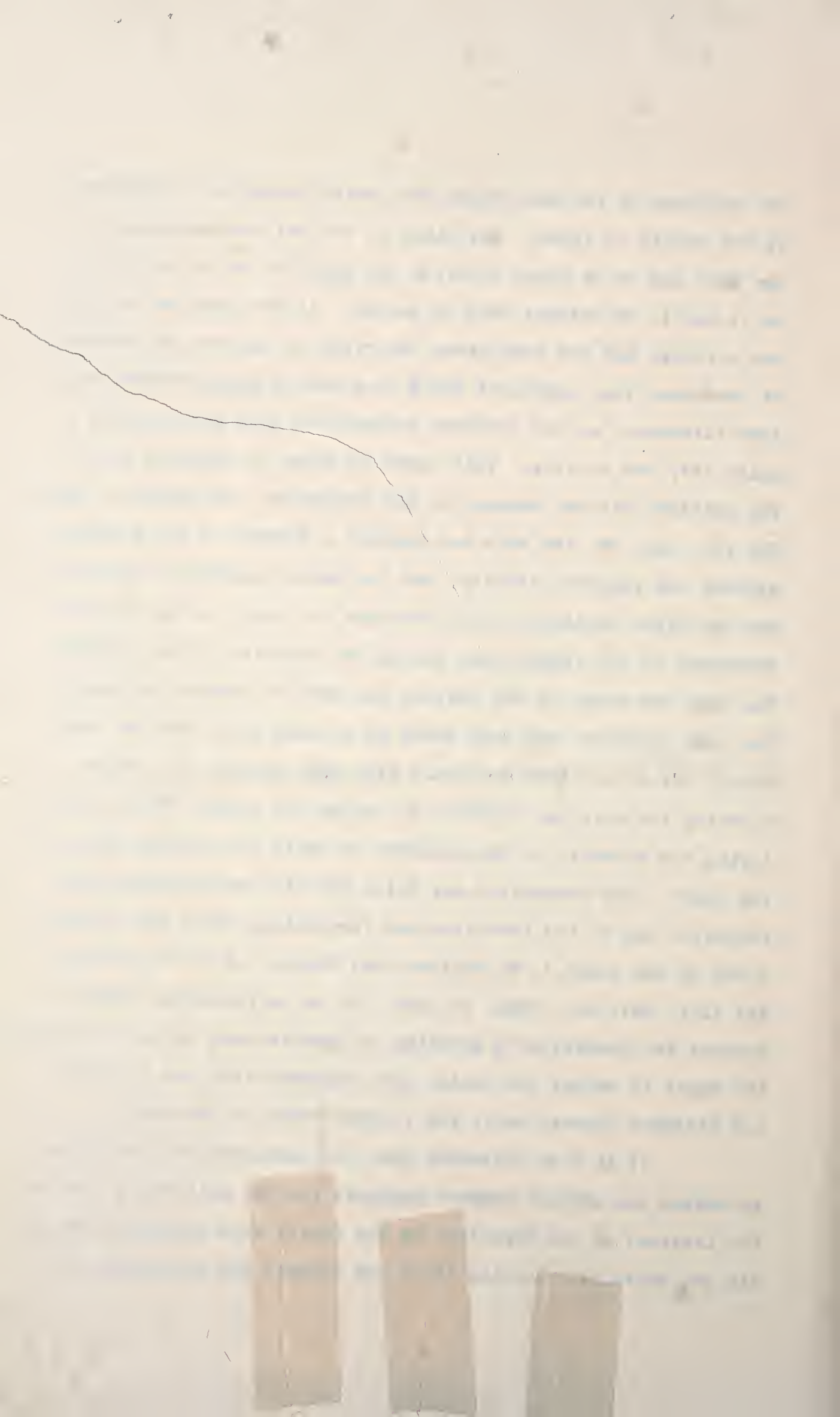
The acts and conduct which will constitute extreme and repeated cruelty within the meaning of the statute are not the same thing under all circumstances and to all persons. Appellant's conduct here was wilful and exposed his wife to serious bodily harm, was without provocation and accompanied by deliberate insults. This has frequently been held to be sufficient to constitute extreme and repeated cruelty within the meaning of the divorce statute. (Wesselhoeft v. Wesselhoeft, 369 Ill. 419; Teal v. Teal, 324 Ill. 207; Lipe v. Lipe, 327 Ill. 39; Bogaerts v. Bogaerts, 344 Ill. App. 497).

As to the appellant's claim that the court had no authority to decree to the appellee the use and the occupation by her and the



two children of the home which she jointly owned with appellant, we are unable to agree. The right to the use and occupancy of the home had to be given either to the appellee or the appellant, or it had to be ordered sold or rented. If the appellee and the two children had not been given the right to the use and occupancy of the home, then appellant would have had to have provided for them elsewhere, as the evidence showed that this was the only place they had to live. This right so given to appellee and the two children did not operate to his prejudice. In *Rardin v. Rardin*, 339 Ill. App. 68, the wife was granted a divorce on the ground of extreme and repeated cruelty, and the decree allowed to the wife and the minor children of the marriage the right to the use and occupancy of the family home during the minority of the children. The home was owned by the husband and wife as tenants in common. The same complaint was made there as is made here, but the court (p. 74) said: "We do not find any fault with that part of the decree allowing the wife and children to occupy the Dobson Street house during the minority of the children or until the further order of the court. The chancellor may allow the wife and children the exclusive use of the furniture and furnishings until the further order of the court." We believe that Section 18 of the Divorce Act (Ill. Rev. St., Chap. 40, par. 19) is sufficiently broad to warrant the chancellor's granting to appellee and the minor children the right to occupy the family home together with the furniture and fixtures therein until the further order of the court.

It is also contended that the court was not justified in making the monthly support payments for the children a lien on the interest of the appellant in the family home jointly owned by him and appellee. Section 18 of the Divorce Act authorizes the



court to require reasonable security for the payment of alimony and support money. The evidence here shows that the defendant owned no other real estate and had no other property of any consequence. Under such circumstances, the court was amply justified in subjecting his interest in the real estate in question to a lien for the support payments.

Finally, appellant urges that the monthly support payments of \$105.00, which the court ordered him to make for the support and maintenance of the two minor children of the marriage, are unreasonably high and excessive and more than he can reasonably be expected to pay. The evidence showed that his gross income was \$340.00 a month and that his net income was \$210.00 a month. The appellee earned approximately \$100.00 a month while doing part time work as a registered nurse. She testified to an itemized list of her and the children's living expenses, which included such items as heat, water, telephone, clothing, food, care of the children while she was working, payment on a mortgage on the house, and miscellaneous items. This list of her living expenses totaled approximately \$250.00. Adding the \$105.00, which the court required appellant to pay, to the \$100.00, which the appellee earns, still leaves a substantial deficiency. Under these circumstances we cannot say that the support payments, although high, are excessive and beyond the ability of the appellant to pay. He has \$105.00 left for his own living expenses. In any event, the question is one which is always open for further consideration by the court upon a proper showing, as is also the question of who should make the monthly payments due on the encumbrance on the real estate jointly owned by the parties.

For the reasons given, the decree is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this...12th...day of.....May....., in the year of our Lord one thousand nine hundred and sixty...one.....

Paul V. Wunder

Clerk of the Appellate Court.

45682

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

LORENZO PEREZ,
Plaintiff in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO

345 I.A. 408²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information filed in the Municipal Court of Chicago on August 14, 1951, charged that on August 12, 1951, in Chicago, Cook County, Illinois, Lorenzo Perez unlawfully, wilfully and knowingly had in his possession and under his control "certain cannabis-sativa-L- (commonly called marijuana or loco weed) from which the resin had not been extracted," he then and there not being a registered grower or manufacturer of the drug or any of its derivatives, contrary to the form of the statute in such case made and provided. The common law record shows that on the day the information was filed defendant was arraigned, pleaded not guilty, waived a trial by jury and that after a trial the court found him guilty of "unlawfully having in his possession a certain habit forming drug: to-wit: marijuana," entered judgment on the finding and sentenced him to confinement in the County Jail of Cook County for a term of one year.

On September 13, 1951, defendant moved to vacate the judgment and finding and also filed an alternative motion in the nature of a writ of error coram nobis, supporting the motions by affidavits. In the affidavits he states that at the time of his arrest and trial he was 18 years of age,

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

having been born in Jancey, Texas, on September 6, 1932; that until the summer of 1951 he worked on farms in that vicinity; that in the summer of 1951 he and his father, brother and four sisters went to Minnesota and he worked in the beet fields; that from Minnesota he and his family came to Illinois about 3 or 4 days before he was arrested; that he went to work on an onion farm in the environs of Chicago; that he does not speak English; that he understands but little of that language; that he had no schooling beyond the first grade; that all his life he spoke only Spanish; that he is illiterate; that he does not know how to read or write either English or Spanish beyond signing his name; that he was arrested on August 12, 1951, while walking peaceably on Halsted Street in Chicago; that the police who arrested him had no reason to believe or suspect that he was violating any law; that they had no warrant for his arrest; that in fact he was not violating any law; that he was booked on August 13, 1951, at 6:00 P.M. and was brought before one of the judges in the Municipal Court on the morning of August 14, 1951, without being given an opportunity to communicate with any member of his family, or to engage counsel for his defense; that he is unfamiliar with court procedure; that he did not understand the situation from the time of his arrest until his arraignment and trial; that he was arraigned and tried without having counsel for his defense, without understanding the nature of the charge against him and the consequences thereof if found guilty, without understanding that he had a right to counsel and a right



to a trial by jury; that upon arraignment and trial no one explained to him, or explained to him in a manner he could understand, that he had a right to counsel and a right to trial by jury; and that since the commencement of his term in the County Jail he has engaged counsel and been advised of his rights. On September 13, 1951, defendant was given leave to file his motions and petition and a rule was entered on the People to plead, answer or demur instantler. On September 17, 1951, the court sustained the People's oral motion to strike the petitions and denied defendant's motions. The case is here on a writ of error sued out by the defendant.

Defendant seeks to reverse the judgment in the case in chief and the judgment on the adverse ruling on his petition in the nature of a writ of error coram nobis. The proper procedure to review the conviction in a criminal case is by writ of error, while the proper procedure to review the adverse judgment on the petition in the nature of a writ of error coram nobis under §72 of the Civil Practice Act is by notice of appeal. Rule 28 of the Supreme Court (Rule 4 of this court) provides that if a writ of error be improvidently sued out in a case where the proper method of review is by appeal, or if appeal be improvidently employed where the proper method of review is by writ of error, this alone shall not be ground for dismissal, but if the issues of the case sufficiently appear on the record before the court of review, the case shall be considered as if the proper method of review had been employed. Under that rule it is our duty to pass upon the judgment wherein he was convicted and also

the judgment against him on his petition. We do not find anything in his petition showing errors of fact which by the common law could have been corrected by a writ of error coram nobis.

We turn to a consideration of the points urged for reversal of the judgment of conviction. He says that the information is fatally defective because it does not allege **the** part of cannabis-sativa possessed, that the narcotic plant was not within the parts of the cannabis plant exempted from the operation of the statute, and that it fails to negative an exception or proviso in the enacting clause of the statute. The Act defines certain words and phrases used therein. It was held in Fawcett v. State, 127 S. W. (2) 905, (Texas) that an indictment charging unlawful possession of a narcotic, to-wit: marijuana, was sufficient in view of the statutory denomination of cannabis as a narcotic drug, which under the statute includes those varieties of cannabis known as marijuana. Cannabis Sativa is defined in Gould's Medical Dictionary (5th edition) as follows:

"* * * The flowering tops of C. sativa, of which there are two varieties, C. indica and C. Americana, the former, being the more potent; they contain a resin, cannabin, and a volatile oil, from which are obtained cannabene, $C_{18}H_{20}$, a light hydro-carbon, and cannabene hydride, a crystalline body. It is antispasmodic, narcotic and aphrodisiac. In large doses it produces mental exaltation, intoxication, and a sensation of double consciousness. It is used in migraine, in paralysis agitans, in spasm of the bladder, in sexual impotence, in whooping cough, in asthma, and in other spasmodic affections. * * *"

The Act under which defendant is prosecuted provides that in any information, indictment, action or proceeding brought for the enforcement of any provision thereof, it

shall not be necessary to negative any exception, excuse, proviso or exemption contained in this Act, and that the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant. We are of the opinion that the information adequately and sufficiently informed the defendant of the crime with which he was charged. In view of the language of another section of the Act, which states that it shall not be necessary to negative any exception, proviso or exemption contained in the Act, it was unnecessary to charge that defendant does not come within the exception of §192.11 of the Act.

The second point urged by defendant is that the judgment of conviction is void because there is a variance between the information and the finding and judgment. Defendant was found guilty of "unlawfully having in his possession a certain habit forming drug, to-wit: marijuana," and was adjudged "guilty of the criminal offense of unlawfully having in his possession a certain habit forming drug, to-wit: marijuana." The question presented is whether marijuana is synonymous with *cannabis sativa*. In People v. Savage, 148P. (2d) 654, the District Court of Appeals Second District, Division 2, California, said:

"Marijuana (variants: mariahuana, marajuana, maraguana, marihuana and mariguana) is another name for Indian Hemp (*cannabis sativa*). (See section 11003, Health and Safety Code, St. 1940, 1st Ex. Sess, p. 17; Vol. 2, Webster's New International Dictionary, 2d Ed. 1939, page 1503; State v. Navaro, 83 Utah 6, 26 P. 2d. 955, 956 et seq; Fawcett v. State, Tex. Cr. App.; 127 S.W. 2d. 905, 906; State v. Economy, 61 Nev. 394, 130 P. 2d. 264, 269."

Defendant's contention that the judgment of conviction is void and that there is a variance between the information and the finding and judgment are without merit.

Finally, defendant asserts that he did not have a fair trial, pointing out that at the time of his arrest and conviction he was 18 years of age; that he did not speak or understand the English language; that he was illiterate; that he does not read or write in either Spanish or English; that at the time of his arrest he was walking peaceably on Halsted Street; that he was arrested without a warrant; that he was not violating any law; that he was held by the police without being given an opportunity to communicate with any member of his family or engage counsel for his defense; that he did not understand the nature of the charge against him; and that he did not understandingly waive his right to a trial by jury. We agree with the People that whether defendant understandingly or intelligently waived his right to a trial by jury and to counsel cannot be determined upon the common law record. As plaintiff does not present a bill of exceptions, we are unable to pass upon his contention that he did not have a fair trial.

For the reasons stated, the judgments of the Municipal Court of Chicago are affirmed.

JUDGMENTS AFFIRMED.

FRIEND, J., and NIEMEYER, J., Concur.



112

15

45394

345 I.A. 409

PEOPLE OF THE STATE OF ILLINOIS)	
ex rel. FRED W. HARTMAN, MARTIN)	
J. CONROY, JAMES R. PROSSER,)	
ROBERT J. LYNSEY, JOHN J.	)	APPEAL FROM
BIERNE, JOHN K. MULLEN, JOHN)	
J. MURPHY and CLAUDE CONNELLY,	)	SUPERIOR COURT,
Appellees,)	
	)	COOK COUNTY.
v.)	
)	
STEPHEN E. HURLEY, ALBERT W.)	
WILLIAMS, CHARLES A. LAHEY,)	
Civil Service Commissioners of)	
the City of Chicago; JAMES S.)	
OSBORNE, Chief Examiner, Chicago)	
Civil Service Commission,)	
Appellants.)	

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed complaint for a writ of mandamus commanding the commissioners and the chief examiner of the Civil Service Commission of the City of Chicago to allow seniority credit in promotional examination for sergeants of police. The results of the examination have not been announced, but plaintiffs contend that by virtue of the fact that they were temporary patrolmen from 1945 until October, 1947, when they were certified and appointed patrolmen in the civil service, their service as temporary patrolmen should be added to their civil service in determining their seniority rating. After motion to strike the complaint had been overruled, the trial court entered judgment on the pleadings and directed that a peremptory writ of mandamus issue commanding the Civil Service Commission to allow credit for prior service as prayed.

The legal issue which emerges from the pleadings

necessitates an interpretation of Section 3 of Rule V of the Rules and Regulations of the Civil Service Commission, which is as follows:

"Sec. 3. Seniority. Credit for seniority shall be given only for actual service in the rank or grade from which promotion is sought, whether such service has been continuous or not. Seniority shall be computed as of the date of examination. The average marking to be entered for seniority shall be obtained by adding to a standard mark of 70, as follows:

For the first six months...	0
For each full month of the second six months.....	1/2
For the second full year.....	3
For the third full year.....	4
For the fourth full year.....	4
For the fifth full year.....	3
For the sixth full year.....	3
For the seventh full year.....	2
For the eighth full year.....	2
For the ninth full year.....	2
For the tenth full year.....	2
For each additional year of service after ten years (maximum 14 years)....	1/2***"

Plaintiffs contend that the language "Credit for seniority shall be given only for actual service ***" means that they are entitled to credit for all the time during which they served as patrolmen, whereas the Civil Service Commission contends that "Credit for seniority shall be given only for actual service ***" means that credit for seniority shall be given for actual service in civil service. It would serve no purpose here to analyze the arguments advanced by the respective parties for the reason that the legal principle involved has been determined adversely to the plaintiffs' contention by this court in the recent case of Hartman v. City of Chicago, 343 Ill. App. 103. Although the question in that case arose in somewhat different form,

-3-

the substance of the holding is applicable to the instant case. There the annual appropriation ordinance of the City of Chicago fixed varying rates of pay for police patrolmen based on years of service. The contention was there made, as here, that years served by patrolmen under temporary appointments should be added to the time of service, whereas the Civil Service Commission contended that only such time as was served in the classified civil service should apply. The conclusion there reached is decisive of the issue here. The following language is pertinent (pp. 111-115):

"The term 'Patrolman' has a definite meaning, viz., a de jure patrolman who has taken a civil service examination, passed the same, and has been certified and appointed to the position of patrolman in the classified civil service in accordance with the Cities Civil Service Act. ***

*** As there are no words in the 1948 ordinance that even refer to temporary patrolmen and their time of service as temporary patrolmen, plaintiffs are forced to argue that the word 'Patrolman' without the qualifying words 'civil service' should be interpreted to include civil service patrolmen and temporary patrolmen, and that as the words 'service' are not qualified by the word 'civil' the words 'service' should be interpreted to mean actual service in the Police Department and that such actual service would include plaintiffs' time of service as temporary patrolmen. We have heretofore stated the established and definite meaning of the word 'Patrolman.' The words in the 1948 ordinance as to years of service clearly denote services of a permanent character, such as services performed by patrolmen in the civil service, but they certainly do not denote services performed by a 'temporary patrolman,' where the appointment is for a limited period and the temporary patrolman can be discharged at will. *** When plaintiffs were appointed patrolmen in the civil service each received an appointment to an entirely new and distinct position and, in our judgment, were then entitled, under the appropriation ordinance of 1948, to receive only the salary appropriated by the City Council for patrolmen in the first year of civil service."

Plaintiffs contend that Hartman v. City of Chicago, 343 Ill. App. 103, was limited to the construction of the annual appropriation ordinance of the City of Chicago for the years 1945 to 1949, and therefore is not controlling on the issue raised in the case at bar. As commented above, we are of the opinion that the principle in both cases is identical, to-wit: that plaintiffs may not add their service as temporary patrolmen to their service as civil service patrolmen, in the one case for the purpose of determining their rate of pay, and in the instant case for the purpose of increasing seniority rights. 11

Accordingly, the judgment of the Superior Court of Cook County is reversed.

Judgment reversed.

Schwartz and Robson, JJ., concur.



113

A

45468

345 I.A. 410¹

ANTHONY BELCORE,)	
Appellant,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
SANTO PAOLETTI,)	
Appellee.)	

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed statement of claim in forcible entry and detainer July 17, 1950. Judgment finding right of possession in plaintiff was entered July 31, 1950, which ordered that the writ of restitution be stayed until January 31, 1951. January 22, 1951, a petition in the nature of a writ of audita querela praying vacation of the judgment of July 31, 1950, was filed, and on the same day an order was entered setting aside said judgment order.

The petition for the writ alleges that the plaintiff was awarded possession of the premises based on allegations that possession was desired "for immediate and personal use and occupancy as housing accommodations by Anthony Belcore, co-owner, who will be married in August, 1950"; that the marriage did not occur and therefore the condition under which possession was awarded was violated. Plaintiff urges that the petition for a writ of audita querela sets forth no sufficient grounds for setting aside the judgment entered on July 31, 1950. No brief has been filed on behalf of the defendant.

We agree with plaintiff's contention that the court was without jurisdiction to set aside the judgment

-2-

upon the allegations set forth in the so-called petition for a writ of audita querela after the expiration of the thirty days. Ill. Rev. Stat. 1949, chap. 77, par. 82; Trupp v. First Englewood State Bank of Chicago, 307 Ill. App. 258. The order of the Municipal Court of Chicago vacating the judgment is reversed and the cause remanded with directions to reinstate the judgment of July 31, 1950, and to issue a writ of restitution forthwith.

ORDER VACATING JUDGMENT REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Schwartz and Robson, JJ., concur.

114

K

45508

ANTHONY ANZALONE,
Appellant,

v.

HARRY A. JOHNSON,
Appellee.

HARRY A. JOHNSON, for the
use of ANTHONY ANZALONE,
Appellant,

v.

MARINE NATIONAL BANK OF
CHICAGO, a corporation,
Garnishee,
Appellee.

345 I.A. 410²
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

On October 9, 1950, plaintiff (appellant), recovered
a judgment on a contract action in the Municipal Court of
Chicago, before the court without a jury, against defendant
(appellee) Harry A. Johnson, for \$2,204.00 and costs.

An execution was issued and returned nulla bona.
Thereafter the Marine National Bank of Chicago was served
as garnishee. On February 7, 1951, 121 days after judgment
had been rendered, defendant filed a petition to vacate
said judgment and on February 23, 1951, an amended petition.
On this date the court entered an order vacating the judg-
ment and on February 28 the garnishee was discharged.
Plaintiff appealed from the order vacating the judgment
and from the order discharging the garnishee. Plaintiff
contends that the trial court erred in setting aside the
judgment based on an affidavit filed by Maurice L. Aberman,
attorney for the defendant, in that no facts were alleged

showing fraud, accidents or mistake, as is required under Section 21 of the Municipal Court Act. ✓

Defendant urges two principal points to sustain his motion that the judgment was void: (1) That no evidence was presented to the court for the determination of the issues of fact. (2) The judgment entered by the Municipal Court was void because a jury demand having been filed by the plaintiff, the court had no right to hear any evidence submitted upon the merits for the assessment of damages. It should have been heard by a jury. }

An examination of the facts shows that defendant, Harry Johnson, operated a parking lot in Chicago. According to the statement of claim, on April 26, 1949, plaintiff delivered his 1948 Pontiac for safekeeping and in good condition to the parking lot of defendant. The defendant in breach of his contract with plaintiff moved said automobile to a distant parking lot from which it was stolen. Plaintiff claimed damages in the sum of \$2,204.00. Defendant by his defense admitted receiving plaintiff's car; that it was moved and stolen as alleged in plaintiff's statement of claim but denied that the car was lost as a result of his negligence. After many continuances the case came on for trial on October 9, 1950. The defendant did not appear. The court without intervention of a jury heard the evidence and found against the defendant and assessed plaintiff's damages at \$2,204.00. ✓

Section 21 of the Municipal Court Act provides that no motion to vacate or modify a judgment shall be

-3-

entered within thirty days after the entry of such judgment except by a petition setting forth the grounds for vacating, which would be sufficient to cause the same to be vacated and set aside or modified by bill in equity, provided, however, that all error in fact in the proceedings in such case which might have been corrected at common law by a writ of error coram nobis may be corrected by the motion, or the judgment may be set aside in a manner provided for similar cases in the Circuit Court.

An examination of defendant's affidavit shows no fraud perpetrated on the court, leaves a serious doubt as to the diligence of defendant's counsel, and sets forth no meritorious defense to the action on its merits. An examination of the pleadings, reveals that the only question involved was one as to the amount of damages sustained by the plaintiff.

It is apparent that the judgment entered here was because of the failure of defendant or his attorney to appear and make a defense when in the regular course of procedure the case was called for trial. It is well settled that relief will be barred where the applicant has been guilty of negligence and that an agent's or attorney's neglect or want of diligence is binding on the principal. Imbrie v. Bear, 230 Ill. App. 155; People v. Du Bois, 293 Ill. App. 498. No errors of fact have been pointed out or shown by the defendant such as if the court had had knowledge of them would have prevented it from entering the judgment. People v. Noonan, 276 Ill. 430.

The jury demand was made by the plaintiff. Defendant merely filed his appearance. When the cause was reached for trial the defendant was not present or represented by counsel. There was no issue of fact to be tried by a jury. The court had merely to assess the damages, which it had the right to do without intervention of a jury or formal presentation of proof. Plaintiff could waive or withdraw the jury as he saw fit and by proving up the case without the intervention of a jury he waived it. Weil v. Federal Life Ins. Co., 264 Ill. 425, 434; Neumann v. Neumann, 223 Ill. App. 285.

The order of the Municipal Court vacating the judgment as to Harry A. Johnson is hereby reversed and the cause is remanded with instructions to set aside the order vacating the judgment as to Harry A. Johnson. The order discharging the Marine National Bank of Chicago, as garnishee, is hereby reversed and the cause is remanded with instructions to set aside the order discharging the garnishee and to require said garnishee to answer with respect to all funds in its possession or under its control at the time of the garnishment summons.

Orders reversed and causes remanded.

Tuohy, P. J., and Schwartz, J., concur.

45432

103
3 45 I.A. 411

DR. M. R. ROSIN, MRS. M. R. ROSIN
and LOIS ROSIN,

Appellees,

v.

CENTRAL PLAZA HOTEL, Inc., a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

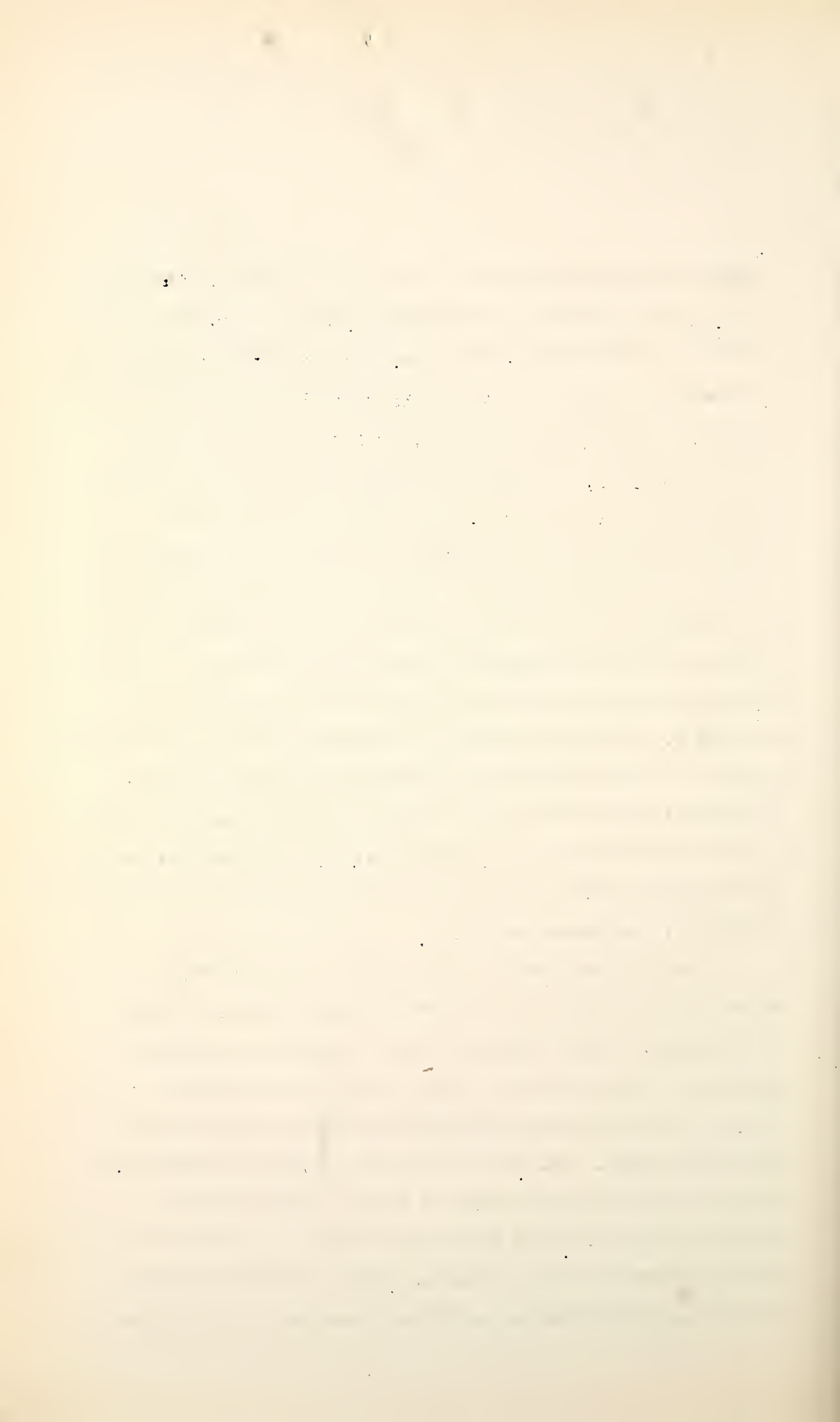
COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 9, 1947, Dr. M. R. Rosin and Frances Rosin his wife, filed a complaint in the Superior Court of Cook County against Central Plaza Hotel, Inc., alleging that on April 16, 1947, they resided in a hotel operated by the defendant; that on that day a "semi-trunk or large suitcase belonging to the plaintiffs and containing personal property and personal effects of the plaintiffs" was delivered by the American Railway Express Agency to the defendant, whose servants accepted and undertook to deliver it to plaintiffs' "quarters"; that defendant failed to deliver the personal property to them; and that it was of the reasonable value of \$1,542.85, for which amount they asked judgment. On January 17, 1950, on motion of plaintiffs, Lois Rosin, their daughter, was joined as a plaintiff. In its amended answer defendant said that Dr. Rosin resided on the premises as a month to month tenant, having leased an apartment to be occupied by him and his wife; that after it received the suitcase from the Express Agency it delivered the suitcase to plaintiffs' apartment; that Mrs. Rosin, then in charge of the apartment, refused to accept the suitcase and instructed

defendant's servant to take it back to the lobby, which was done; that on the next day defendant, by its servant, delivered the suitcase; that Mrs. Rosin refused to accept it and directed that it be "taken back to the lobby of the hotel until she should call for same," which the servants did; that thereafter, without any negligence on the part of the defendant or its servants, the suitcase in some manner to the defendant unknown disappeared; that at all times the defendant used the requisite degree of care "in the keeping and handling" of the suitcase; and that it employed in and about its business competent agents and servants. It denied that at any time Lois Rosin resided or became a guest in the hotel. A trial resulted in a verdict finding the defendant guilty and assessing "the plaintiff's damages" at \$1,000. Defendant's motion for a new trial was overruled. The court entered judgment that plaintiffs Dr. M. R. Rosin, Mrs. M. R. Rosin and Lois Rosin recover from the defendant their damages of \$1,000. Defendant appeals.

Dr. and Mrs. Rosin became guests at the Central Plaza Hotel, located at 321 North Central Avenue, Chicago, in February, 1947. After the first week they occupied an apartment consisting of a living room with an in-a-door bed, a dressing room, kitchenette and bath, for which they paid \$25 a week. Dr. Rosin was in the optical business. He and his wife had been living in Texas. They moved from there so that Dr. Rosin could take charge of a store he and his brother owned in Cicero. Their daughter Lois was attending the University of Texas in Austin. She remained



there when her parents moved north. She was 18 years old. Lois did not at any time become a guest of the hotel. In April, 1947, she decided to leave school. She had a wardrobe of clothing and personal effects which she packed and shipped to her father at the defendant's hotel via the American Railway Express Company. She packed her clothing and personal effects in a trunk and a large rawhide suitcase. In addition to the clothing, the luggage contained a silver fox jacket and some jewelry. The baggage consisted of a trunk and a large suitcase. At the time she delivered the two pieces of baggage to the agent of the express company she placed a value on each piece of \$1,500. She did not notify defendant that the baggage was being forwarded or the value thereof and she did not notify it that she was coming there as a guest. The baggage arrived at the hotel about a week after it was dispatched. The day after its arrival Mrs. Rosin called Lois on the telephone and told her that the suitcase had "disappeared." After this conversation Lois made out a list of the contents of the suitcase and a few days later she arrived in Chicago. She did not stay with her parents but with an aunt who lived nearby.

The trunk and suitcase were delivered to the hotel on April 16, 1947 at about 11:30 a.m. The defendant paid the express charges for the account of Dr. Rosin. At the time no one was in the Rosin apartment and a notice of the arrival of the luggage was time-stamped and put in their box. The two pieces of baggage were placed in the lobby along with other bags of incoming guests, within 20 or 25 feet of the

clerk's desk. There was testimony that the two pieces of baggage were at all times in view of the clerk. When Dr. and Mrs. Rosin came in that night they saw and recognized the two pieces of baggage standing in the lobby as their daughter's. They stopped at the desk to pick up the key and see if there were any messages and then went to their room and retired. The next morning the two pieces of luggage were still in the lobby. At about eight o'clock that morning the desk clerk telephoned Mrs. Rosin that the luggage was being brought up. She was in bed and asked that the luggage be brought up in about an hour. Later the trunk was brought up but not the suitcase. The suitcase was missing and has not been seen since. An investigation was made but neither the suitcase nor its contents could be found. The clothes and all other personal effects in the suitcase were the property of Lois Rosin. Mrs. Rosin said she owned the suitcase, which she valued at \$115. Dr. Rosin owned nothing of what was lost.

Defendant asserts that the court erred in refusing to give an instruction tendered by it that if they believed that Lois Rosin was the owner of the chattels alleged to be lost, that she never became a guest of the hotel, and that the relationship of innkeeper and guest did not arise between her and defendant, that in such circumstances defendant became a gratuitous bailee of the chattels of Lois Rosin, in "duty bound to exercise no more than reasonable care to protect the goods from loss or damage, and the other plaintiffs, Dr. and Mrs. M. R. Rosin became the agents of Lois Rosin,

the owner and bailor of the goods." It will be observed that the complaint does not allege ultimate facts from which it could be said that Lois Rosin was a guest. The evidence shows that she was not a guest. Where the relationship of innkeeper and guest does not exist, responsibility of an innkeeper for the safekeeping of the property of another is that of a bailee. 43 C. J. S., Innkeepers, §18, p. 1164. Defendant had the right to an instruction informing the jury as to the duty which it owed in the care of the baggage of Lois Rosin delivered to it, and that the relation of innkeeper and guest did not arise between defendant and Lois Rosin. In accordance with the rules governing bailments generally, an innkeeper who is deemed to be a gratuitous bailee is liable only for a loss occasioned by gross negligence or fraud. 43 C. J. S. §18, p. 1165.

Defendant maintains that the court erred in instructing the jury that if they found from a preponderance of the evidence that the wearing apparel, personal effects and luggage were delivered to defendant for Dr. and Mrs. Rosin, and were lost while in the custody of defendant "then you should find the issues for the plaintiffs unless you shall further find from a preponderance of the evidence that the defendant has exonerated itself from liability for or on account of such loss by showing the manner in which such loss occurred, and by further showing that such loss occurred without any negligence or fault on the part of the defendant." Defendant introduced evidence from which the jury could find that the loss occurred without any negligence on its part. The instruction is misleading in that it authorizes

-6-

the jury to return a verdict for plaintiffs unless the defendant exonerated itself by showing the manner in which the loss occurred and that the loss occurred without any negligence on its part. We have not found any reported case which requires the innkeeper to show at his peril the manner in which the loss occurred. It was error to give this instruction. ✓

Defendant argues that the court erred in refusing to give an instruction that in no event could plaintiffs or either of them recover if the jury believed from the evidence that "the lost trunk, or valise, or traveling case contained property or effects of special or unusual value," and that plaintiffs failed to notify defendant to that effect and failed to acquaint defendant with the proximate value, and that in such event the jury's verdict should be for the defendant. Under the evidence this would be a proper instruction if the relationship of innkeeper and guest existed between plaintiffs and defendant. Section 3 of the Innkeepers Act is applicable to those related as innkeeper and guest. There was no such relationship in the instant case. The instruction was not applicable to the facts.

Plaintiffs call attention to the fact that defendant did not plead the Innkeepers Act as a defense. Should the defendant desire to avail itself of a provision of the Innkeepers Act, sufficient ultimate facts should be pleaded to state a defense thereunder. Section 43 (4) of the Civil Practice Act provides that the facts constituting any affirmative defense and any ground or defense whether affirmative or not, which, if not expressly stated in the pleading would be likely

to take the opposite party by surprise, must be plainly set forth in the answer or reply. Par. 1 of Rule 13 of the Supreme Court states that where a breach of statutory duty is alleged the statute shall be cited in connection with such allegation.

Defendant calls attention to the fact that the verdict assesses the damages in favor of one plaintiff without designating which one, while the judgment is in favor of the three plaintiffs, and urges that since the verdict is in favor of one of the plaintiffs it is insufficient to support a judgment in favor of all plaintiffs, and that as it fails to name the plaintiff in whose favor it is found it is equally insufficient to support a judgment in favor of any of the plaintiffs, citing cases. As the judgment must be reversed and on a retrial the fault pointed out would be unlikely to be repeated, we do not think it is necessary to comment on this point. Defendant complains that on the trial Miss Rosin was permitted to testify from a list of the contents of the suitcase, made up immediately after being informed of the loss. We are of the opinion that she had a right to use the memorandum for the purpose of refreshing her recollection of the contents of the suitcase. The memorandum was made up a week after the suitcase was packed. The court did not err in permitting her to refresh her recollection by reading the memorandum. She testified as to matters within her own knowledge after refreshing her memory by the use of the memorandum. ✓

-8-

The judgment of the Superior Court of Cook County is reversed and the cause is remanded for a new trial with directions to proceed in a manner not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and NIEMEYER, J., Concur.



45501

104

14

3 45 I.A. 412¹

FRANK STEELE, a minor, by MARY T.
CALHOUN, his mother and next friend,
Plaintiff - Appellee,

v.

DARLENE MULARKEY and JOHN MULARKEY,
Defendants - Appellants,
and
ZERLEAN SULLIVAN,
Defendant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On January 19, 1949, Frank Steele, a minor, by his next friend, filed a complaint at law in the Circuit Court of Cook County against Darlene Mularkey and John Mularkey to recover damages for injuries allegedly sustained as a result of an automobile collision in Chicago on or about December 26, 1948. After defendants filed an answer they moved to Fort Lauderdale, Florida, and became citizens and residents of that State. Thereafter, (April 13, 1950) the case proceeded to trial before Judge Thomas J. Courtney. Because of a development in the trial, plaintiff's attorney (on April 13, 1950) was granted his request for a nonsuit and the case was dismissed. On May 9, 1950, plaintiff's attorney served a notice on the attorney for defendants, that plaintiff would appear before Judge Harry M. Fisher, or alternatively before Judge Thomas J. Courtney, and ask the court to grant his verified petition to vacate the order of April 13, 1950, and to reinstate the case for immediate trial. Defendants appeared by their attorney

10

-2-

specially for the sole purpose of moving to strike plaintiff's petition and to transfer the petition to Judge Courtney. On hearing plaintiff's petition the court (Judge Fisher presiding) denied defendants' motion to have plaintiff's petition transferred to Judge Courtney. On June 13, 1950, the court (Judge Fisher presiding) entered an order vacating the previous dismissal order and reinstating the case. On September 29, 1950, an amended complaint was filed and the defendants were ruled to answer. On November 16, 1950, the defendants appeared and moved to dismiss the action on the ground that another action was pending between the parties arising out of the same subject matter. The motion was denied. On November 17, 1950, defendants answered the amended complaint. On October 19, 1950, defendants filed a motion to dismiss the suit on the ground of want of jurisdiction, which motion was denied, Judge Fisher presiding. On November 9, 1950, defendants filed a motion to expunge the order of June 13, 1950, which reinstated the cause. On November 9, 1950, the court (Judge Fisher presiding) denied the motion to expunge. Defendants appeal from the order of November 9, 1950, denying the motion to expunge the order of June 13, 1950.

Plaintiff filed a motion, supported by suggestions, to dismiss the appeal for want of jurisdiction and defendants filed countersuggestions. The motion was taken with the case. The order of June 13, 1950, which vacated the previous order entered April 13, 1950, dismissing the cause, was based on a petition filed by plaintiff on May 11, 1950, within

30 days after the order of dismissal was entered. Plaintiff's petition was not based on errors of fact under §72 of the Civil Practice Act, but was a petition filed within 30 days, based on §50 (7) of the Act. The essential distinctions which characterize a petition under §72 are discussed in People v. Green, 355 Ill. 468. The right of appeal is created by statute, and in the absence of statutory authority therefor an interlocutory order entered in the progress of a cause is not appealable and may be reviewed only upon an appeal from the final order, judgment or decree. An order, judgment or decree is final only when it terminates the litigation between the parties on the merits of the case.

The order from which defendants appeal determined nothing concerning the merits of the controversy. It was merely interlocutory. See People v. Fisher, 335 Ill. 406, 411; Jenkins & Reynolds Co. v. Wells, 220 Ill. 452; and Rosenthal v. Board of Education, 239 Ill. 29. We are of the opinion that neither the order of June 13, 1950, nor the order of November 9, 1950, is a final order within the meaning of §77 of the Practice Act, which provides that appeals shall lie in cases where any form of review may be allowed by law to revise final judgments, orders or decrees.

For the reasons stated, plaintiff's motion to dismiss the appeal is allowed and the appeal is dismissed without prejudice to defendants' right to urge the points presented on a subsequent appeal from a final judgment.

APPEAL DISMISSED.

FRIEND, J., and NIEMEYER, J., Concur.

105 A

45255

ANNA TOMASELLO and CONCETTA SENESE,

Appellees,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation, and
MIDWEST TRANSFER COMPANY, a
corporation,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

3 45 I.A. 412²

MR. JUSTICE FRIEND delivered the opinion of the court:

Plaintiffs brought suit to recover damages alleged to have been sustained by them because of a collision between a semi-trailer truck owned and operated by Midwest Transfer Company and a street car owned and operated by Chicago Transit Authority at the intersection of Taylor street and Damen avenue in Chicago on February 3, 1947. Motions made at the close of plaintiffs' case and again at the close of all the evidence to instruct the jury to find the Transit Authority not guilty were denied. Thereafter the jury returned verdicts finding both defendants guilty and assessing damages of the plaintiff Anna Tomasello in the sum of \$6,000 and of the plaintiff Concetta Senese in the sum of \$22,500, upon which separate judgments were entered. The Transit Authority filed a motion for judgment notwithstanding the verdicts and, in the alternative, for a new trial, and Midwest Transfer Company filed a motion for a new trial. All these motions were overruled. Appeals filed by both defendants were here consolidated by agreement of the parties.

The accident occurred in the early afternoon. Plaintiffs were sitting in the front seat on the right-hand side of an eastbound Taylor street car. As it was crossing

Damen avenue a southbound semi-trailer truck collided with the north side of the street car at about the front platform, and knocked the front trucks of the street car four to six feet off the track. Ralph Embury, the driver of the truck, was called by plaintiffs under section 60, and also testified in his own behalf. The truck consisted of a tractor about eight feet long and seven feet wide, to which was attached a trailer thirty-four feet long and ten and one-half feet high, having a total empty weight of four tons. He was driving south on Damen avenue, astride the west rail of the southbound street car track, at a speed stated by him to be about twenty miles an hour. The streets were slushy and wet but going at the rate of speed indicated he said he could stop the truck in something like ten feet. The truck was equipped with air brakes which operated on all wheels, including those of the trailer. He stated that he first saw the street car when his truck was about fifteen to twenty feet north of the north curb of Taylor street, at which time it was about fifty feet from him and about thirty-five feet west of the west curb line of Damen avenue. The street car was then in motion, going slowly, one to two miles an hour, and continued to go at that speed until the impact. He testified that at the time his truck was about fifteen feet from Taylor street there was nothing to obstruct his view; that he looked to the east four or five times; that from the time the street car entered the intersection until the collision the motorman had his head turned looking south out of an open door; that he applied his brakes for the first time when he was about

-3-

fifteen feet from the street car which was then almost past the middle of the intersection and had traveled to the second or northbound car track; that his truck slid and was going about fifteen miles an hour when it struck the street car on the left side of the journal box and then swerved to the east just before the collision. Thus, according to Embody, the street car traveled from some point west of the west curb of Damen avenue to the northbound street car track on Damen avenue at one to two miles an hour, while the truck traveled from a point fifteen to twenty feet north of Taylor street to the eastbound street car track in Taylor street at fifteen to twenty miles an hour. Considering the plat of the intersection which was admitted into evidence by agreement of the parties, showing the width of the respective streets, this could not be an accurate description of the accident. Embody was the only witness who testified that the street car did not stop before entering the intersection. As against his testimony there was the testimony of four witnesses who stated that the car stopped for several seconds; both the conductor and the motorman stated that they took on a passenger before entering upon the intersection. The various witnesses to the accident placed the speed of the street car at from one to three miles an hour; as to the speed of the truck, their testimony was more at variance, and ranged from twenty to forty miles an hour. Considering the lowest speed of the truck and the highest speed of the street car, the truck was traveling over six times as fast as the street car, and consequently would have covered approximately six times as much ground in the same space of time. Consequently, as

counsel for the transit authority point out, when the street car entered the intersection at the west curb of Damen avenue and was about thirty feet from the northbound Damen avenue street car track, the truck must, of necessity, have been approximately 200 feet from the eastbound track in Taylor street; and of course if it was that far north of the north curb of the intersection when the street car entered the intersection, the motorman, when he started to cross the intersection, would have had no reason to anticipate that the driver of the truck did not see the street car; it was daylight, the car was about fifty feet long, and there was nothing to obstruct the truck driver's view. Certainly the motorman had no reason to anticipate that the driver of the truck would continue approximately 200 feet toward the intersection which was then being crossed by the street car without preparing to slow down or stop, if need be, to permit the street car to complete the crossing. According to Embody's own testimony he was fifteen feet from the street car before he applied the brakes, and he testified that under the prevailing conditions and ^{considering} ~~under~~ the rate of speed at which he was traveling he could bring the truck and trailer to a stop within approximately ten feet.

Plaintiffs' suit is predicated upon the negligence of both defendants, and of course if any negligence on the part of Chicago Transit Authority had been established, and assuming that the case was otherwise fairly tried, we would not be justified in disturbing the verdicts as to the liability of the respective defendants. It clearly appears, however, that, based upon the collective testimony of all

the witnesses including Embody, plaintiffs failed to prove that the defendant Chicago Transit Authority was in any wise negligent. Embody's negligence, according to his own testimony, was clearly the proximate cause of the collision. The authorities are in accord that if the testimony of a witness is contrary to the general knowledge and experience of mankind, and is necessarily impossible under the circumstances narrated, neither a court nor a jury is required to give it credence, and it may be disregarded. As stated in the recent case of Tepper v. Campo, 398 Ill. 496, "This court has repeatedly held that there may be such inherent improbability in the testimony of a witness that neither court nor jury are required to give it credence, even in the absence of any conflicting or contradictory evidence. (Schueler v. Blomstrand, 394 Ill. 600; Stephens v. Hoffman, 275 Ill. 497; People v. Davis, 269 Ill. 256.) The uncontradicted testimony of interested witnesses to an improbable fact does not require acceptance of their testimony. Courts are not required to believe an unreasonable story, even though it is not contradicted, merely because it has been sworn to by a witness on the trial of a case." See also to the same effect, People v. Bentley, 357 Ill. 82, and Hadley v. White, 367 Ill. 406. Under the circumstances, the court should have directed a verdict in favor of the Chicago Transit Authority at the close of the case; there was no evidence of negligence as to that defendant.

Judgment against Chicago Transit Authority is reversed and cause remanded with directions to enter judgment in favor of Chicago Transit Authority.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J., and NIEMEYER, J., Concur.

45257

ANNA TOMASELLO and CONCETTA
SENESE,

Appellees,

v.

CHICAGO TRANSIT AUTHORITY, a muni-
cipal corporation, and MIDWEST
TRANSFER COMPANY, a corporation,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

106
3 45 I.A. 413¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The opinion in this case is being filed concurrently with that in No. 45255. The facts and our conclusions as to liability are fully set forth in that opinion and need not be restated. Plaintiffs are clearly entitled to recover damages from the defendant Midwest Transfer Company, and the only question presented on its appeal is as to the award of damages.

The jury fixed Mrs. Tomasello's damages at \$6000.00. Considerable evidence was adduced on trial as to whether a diabetic condition of long standing had been aggravated by the accident. She claims to have received a slight concussion as a result of the accident, also a hematoma of her scalp as large as an egg, and contusions of the right shoulder, knee and spine which required her to be hospitalized for three weeks. Upon discharge she was confined to her son's home for a period of about two months. Her testimony and that of attending physicians indicate that since the accident she has experienced frequent headaches and has been unable to do any work. There is a difference in her sensitivity to insulin, with a resultant increased difficulty

in management of her diabetic condition as evidenced by more frequent comas, loss of consciousness and pain. Everything considered, we think the verdict and judgment of \$6000.00 were not excessive.

Concetta Senese was about fifty-one years old at the time of the accident, in good health, and had never previously been injured. Upon examination on the day of the occurrence, Dr. Louis S. Varzino, an orthopedic specialist, found a large abraded area over the left scapular region, an abrasion with marked tenderness and swelling over the region of the second lumbar vertebra, and a tightness of the muscles of the back indicating a traumatic condition. There was also swelling over the left kneecap and over the right elbow region. She complained of pain on breathing, was unable to urinate and had to be catheterized. Boards had to be placed under the mattress to support the lumbar spine. She was given astringents, and local heat in the form of dry and wet compresses was applied to the various/areas. She had not menstruated for four years prior to the accident, but began to bleed vaginally the day following it. She underwent surgery for this condition, and was hospitalized for two weeks. Some six weeks after the accident she placed herself in the care of Dr. Donald Miller, also an orthopedic specialist, who found hemorrhages over the front and back of her chest, and over the abdomen and left knee joint. She could not raise her arm nor abduct the shoulder joint to more than 180 degrees. The accident left her with a limitation of motion in the spine and with an abnormally thick left knee joint with limited motion. X-rays revealed a narrowing of the



space between the last lumbar vertebra and the sacrum. Out of these areas between the lumbar vertebrae come nerves which form in groups and eventually go to make up the sciatic or big nerve of the leg, and for this traumatic sciatica the doctors advised that she be hospitalized for a study of the discs which may require surgery. At the time of the trial she was still under treatment by Dr. Miller whose bill was then between \$500.00 to \$600.00, and she had received drugs costing between \$100.00 to \$200.00. Five or six months after her discharge from the hospital she still used a cane and suffered considerable pain. Mrs. Senese testified that before the accident she was an active woman, maintaining a household for seven adults; that she had done the washing, ironing and shopping, whereas after the accident she was dependent upon others, could not go any place alone, and was unable to do housework; that two or three times a day she feels a radiating pain from her hip to her toes, has back pain, cannot sleep and takes prescribed sedatives.

It should be noted that defendants offered no medical testimony to dispute the evidence adduced by plaintiffs, nor did they cross-examine any of the medical witnesses who testified on behalf of plaintiffs.

Accordingly the judgment in favor of both plaintiffs against the Midwest Transfer Company is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and NIEMEYER, J., Concur.

107 A
No. 45407

M. H. STEIN,

)
)
) Appellee,

v.)

RUBBER LININGS CORPORATION,

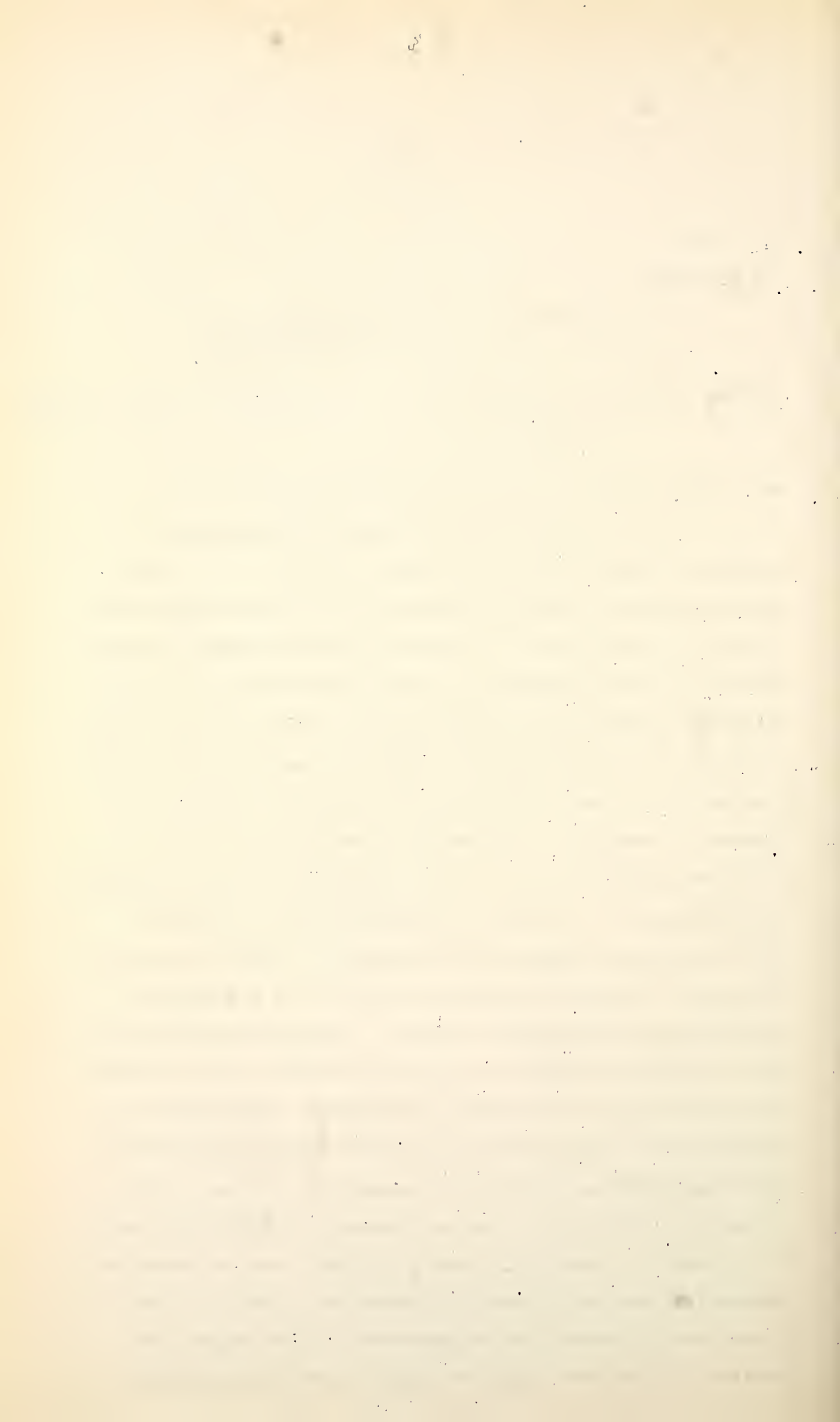
)
)
) Appellant.)

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3 45 I.A. 413²

MR. JUSTICE FRIEND delivered the opinion of the court:

In this case plaintiff sought an accounting to recover one-half of the net profits realized by the defendant corporation from the operations of a joint venture between the parties for manufacture of plastic sheeting during the period from September 11, 1947 until December 31, 1947, when the joint venture was terminated. Plaintiff also sought to recover a weekly salary of \$150 for a period of two years claimed to be due him under an oral agreement made with defendant. Defendant contended that the venture resulted in loss and denied that there was an agreement to pay plaintiff, in addition to a division of the net profits, a salary of \$150 per week, claiming that the receipt of \$1650 in installments for a number of weeks by plaintiff was a drawing account against anticipated profits. Defendant counterclaimed for the \$1650 received by plaintiff because, as it contended, no profits were realized from the venture. The matter was referred to a master who found, and the chancellor decreed, that plaintiff was entitled to one-half of the net profits amounting to \$2543.43, less an allowance of \$1650 which had been drawn by plaintiff, leaving a balance due and owing to plaintiff from the defendant corporation of \$893.43; that there was no evidence of an agreement for the payment of salary to plaintiff; that the master's and stenographer's

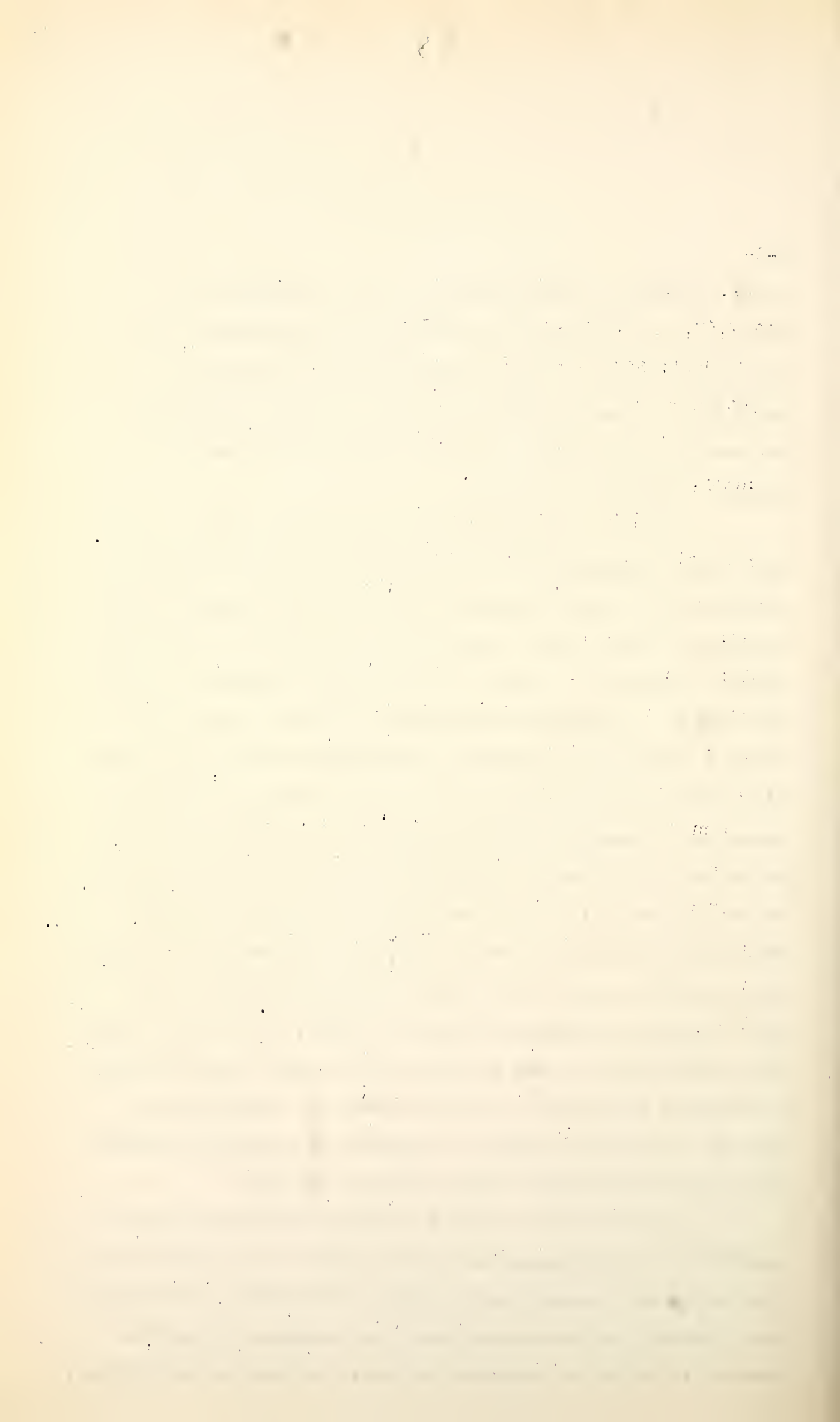


-2-

fees, amounting to \$1103, should be paid one-third, or \$367.67, by plaintiff, and two-thirds, being \$735.33, by defendant; and that inasmuch as plaintiff's drawings of \$1650 were credited against his share of the net profits, defendant's counterclaim should be dismissed for want of equity. Defendant appeals.

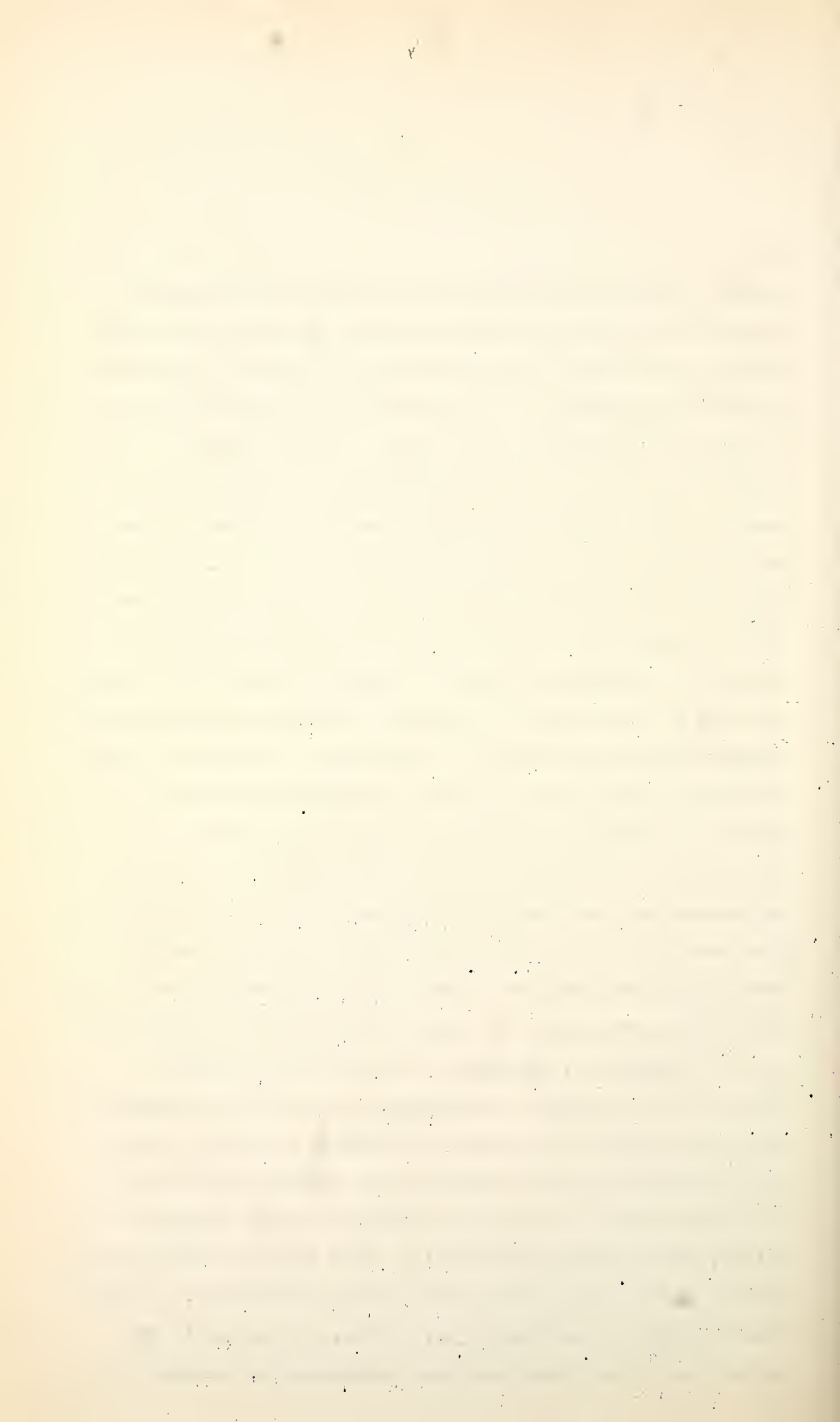
With the exception of the accounting phase of this proceeding, substantially all the facts are uncontroverted. In the fall of 1947 defendant, which had been engaged in the business of lining steel tanks, commenced the manufacture of plastic sheeting. Because it did not have sufficient capital with which to embark on that venture on a large scale, it entered into an oral agreement with plaintiff for the operation of its plastic division as a joint venture. Plaintiff undertook to manage the sale of plastics, finance part of the operation of defendant's plastic operation, and in return was to receive one-half of the profits earned by that division. He loaned defendant the sum of \$10,000 which was later repaid. As heretofore stated, the venture commenced September 11, 1947, and was terminated December 31, 1947. The master found that while plaintiff was engaged in the joint venture he kept a perpetual inventory of plastics; that the inventory was kept in the ordinary course of business and contained entries made on the approximate dates appearing therein.

The sole issue raised on this appeal is as to the correctness of determination by the master and the chancellor that the joint venture made a profit of \$5,086.85. There were many disputed points raised during the hearings before the master affecting the question of profit or loss in the venture,



most of which involved questions of fact; and the master stated that "it is most difficult from the condition of the record to determine to the last penny an accurate accounting between the parties." It is defendant's contention that instead of a profit there was a loss. All the findings in the decree with respect to labor and pay roll taxes, factory overhead, selling expenses and other expenses, for the purpose of this appeal, are accepted by defendant as correct. The dispute between the parties arises over the value of the inventory of December 31, 1947 when the joint venture was terminated. The chancellor and master found the value of the inventory as of that date to be \$17,650. Defendant contends that it should have been \$12,033, or a difference in inventory figure of \$5,617, which would have shown a loss on the venture of \$142.72, instead of a profit, as found by the decree, of \$5,086.85. The rule is well settled in this state that in an accounting proceeding the findings of a master adopted by the chancellor will not be disturbed on appeal unless they are against the manifest weight of the evidence and the decree is clearly erroneous. The rule is well stated in the early case of Williams v. Lindblom, 163 Ill. 346, as follows:


"As we said in Lehman v. Rothbarth, 159 Ill. 270, speaking of an account stated by a master in chancery (p. 279): 'It is well settled that this court will not disturb the finding of the court below, in a case of this kind, merely because it might, as an original proposition, have found the facts as to one or more of the items in the account differently.' And as said in Ford v. Ford Manf. Co., 73 Ill. 48, quoted in the above case: 'The facts have been considered and weighed by



the court below. They have undergone close scrutiny, and it can not be expected that an appellate court will take up each item of account in dispute and endeavor to rectify every supposed error attributed to the court in its finding.' To hold otherwise would require this court to re-state every account to which objection was made, on the ground that it was contrary to the evidence. As a rule it may be stated that the findings of fact by a master (in stating an account) are conclusive, unless a clear mistake or fraud is shown.

14 Am. & Eng. Ency. of Law, 940, and cases cited in note 3." This rule is recognized and approved in the recent case of Shell Oil Co. v. Dye, 135 F.2d 365, wherein the United States Court of Appeals for the Seventh District said, with respect to the Illinois law in an appeal from a chancellor's decree in an accounting sought, that "an accounting decree will not be disturbed by an appellate court unless clearly erroneous," citing the Williams and Lehman cases.

In consonance with this rule we are not disposed, nor would we be justified in endeavoring, to rectify every supposed error attributed to the master and the chancellor in their findings. However, from an examination of the record we think an error was made in the closing inventory found by the decree. Solway C. Firestone, a certified public accountant employed by plaintiff, examined defendant's books and records in the presence of defendant's auditor and president, as well as of the plaintiff. He stated that there were three sales entered in the first week of January 1948, although the invoices were dated in December; that these sales related to invoice No. 13,595 for \$939.60, invoice No. 13,701 for \$1,342.52 and invoice No. 13,704 for \$332.45, dealing with



100

merchandise sold to Slakolite Corporation, and that these three sales should have been included in the December 1947 sales, before the joint venture was terminated. Alexander H. Anderson, an auditor employed by Doty & Doty, certified public accountants for the defendant, testified that he had included in the total sales the three sales to Slakolite Corporation, to which Firestone had referred in his testimony. However, plaintiff's inventory does not show these three sales; they were probably inadvertently omitted because plaintiff was absent from the Chicago office at times on sales work. Nevertheless plaintiff is given the benefit of these three sales in the total sales figure found in the decree, but the inventory found by the chancellor is not decreased by the number of rolls of plastics involved in these sales. They aggregate \$2,619.57, and therefore the closing inventory found by the decree should be reduced by that sum. Accordingly, the account should be stated as follows: the closing inventory of December 31, 1947, as fixed in the decree, is \$17,650; this should be reduced by \$2,619.57, representing the aggregate of the three December sales, leaving the closing inventory as of that date at \$15,030.43, and reducing the profit of the venture as found by the decree from \$5,086.85 to \$2,467.28. Plaintiff was entitled to one-half of this net profit, or \$1,233.64, against which should be charged the sum of \$1,650 which was drawn by him as advances against anticipated profits, leaving a deficit incurred by him of \$416.36, rather than a balance due him of \$393.43, as found by

merchandise sold to Slakolite Corporation, and that these three sales should have been included in the December 1947 sales, before the joint venture was terminated. Alexander H. Anderson, an auditor employed by Doty & Doty, certified public accountants for the defendant, testified that he had included in the total sales the three sales to Slakolite Corporation, to which Firestone had referred in his testimony. However, plaintiff's inventory does not show these three sales; they were probably inadvertently omitted because plaintiff was absent from the Chicago office at times on sales work. Nevertheless plaintiff is given the benefit of these three sales in the total sales figure found in the decree, but the inventory found by the chancellor is not decreased by the number of rolls of plastics involved in these sales. They aggregate \$2,619.57, and therefore the closing inventory found by the decree should be reduced by that sum. Accordingly, the account should be stated as follows: the closing inventory of December 31, 1947, as fixed in the decree, is \$17,650; this should be reduced by \$2,619.57, representing the aggregate of the three December sales, leaving the closing inventory as of that date at \$15,030.43, and reducing the profit of the venture as found by the decree from \$5,086.85 to \$3,467.28. Plaintiff was entitled to one-half of this net profit, or \$1,733.64, against which should be charged the sum of \$1,650 which was drawn by him as advances against anticipated profits, leaving a balance due him of \$83.64, instead of \$893.43, as found by

416.36

rather than a balance due him of

corrected

per. 11/15/55

of 11/15/55

to the profit in the balance

the decree. The decree is affirmed in all other respects.

For the reasons indicated the decree of the Circuit Court is affirmed in part and reversed in part and the cause is remanded with directions that a decree be entered in accordance with the views herein expressed.

DECREE AFFIRMED IN PART AND
REVERSED IN PART AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J., and NIEMEYER, J., Concur.

345 ILL. APP. 108

45413

ALBERT MANN, DOLORES MANN and
DOLORES ROBERTSON,
Appellants,

v.

DONALD MATZ,
Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

345 I.A. 414

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a judgment entered on a verdict of not guilty in their action for personal injuries and property damages sustained as the result of a collision between the station wagon of the plaintiff Robertson and the automobile of defendant.

The plaintiffs, Albert and Dolores Mann were guests in the station wagon, which was driven by Dewey Turner, a brother of Mrs. Robertson. Mrs. Mann is the mother of Turner and Robertson. Albert Mann is their stepfather. The collision occurred on Sunday, November 13, 1949, shortly after 5 o'clock p. m., on Kedzie avenue north of 119th street in the Village of Merrionette Park, Cook County, Illinois. The three occupants of the station wagon were riding in the front seat. Kedzie avenue at this point is a four lane highway, with two lanes for north and south traffic. Turner entered Kedzie avenue at 119th street and was proceeding north in the outer lane for north bound traffic, about four to six feet from the curb or edge of the pavement. His speed did not exceed 15 miles per hour. Defendant was alone in his automobile. He was driving north

at a speed around 40 miles per hour. There was a slight mist or rain. It was dark. Defendant attempted to pass the station wagon on the right. He testifies that as he was passing, the driver of the station wagon turned to the right, causing the collision. Turner testifies that in driving north on Kedzie avenue he did not swerve to either the right or the left; that defendant's automobile sideswiped the station wagon from the door to the front bumper on the right side; that his car was thrown to the northwest, passing over the west curb of Kedzie avenue into an adjacent corn field about 200 feet; he returned to Kedzie avenue and saw defendant's car in the middle of the street, facing south; that defendant was lying on the pavement near the car, and about fifty feet south he found his (Turner's) mother and stepfather also on the pavement. Defendant claims that he was blacked or blanked out by the collision and knew nothing until he later came to, when lying on the pavement. Defendant did not sound a horn. There is a controversy as to whether or not the lights of his car were on.

Defendant admits having been in several taverns, where he drank beer. Turner testifies that at the police station defendant was asked why he was intoxicated and could not stand, and that he replied, "I will admit I am intoxicated, but I won't tell you where I got the whiskey or beer." This testimony is weakened somewhat on cross-examination. At the close of plaintiffs' evidence, the court struck Paragraph 7 of Count One of the complaint, which quoted Section 47 (a) of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat.

-3-

1949, chap. 95 1/2, par. 144) making it unlawful and punishable for any person under the influence of intoxicating liquors to drive any vehicle within the state, and charged that at the time of the collision defendant was under the influence of intoxicating liquors. This ruling was erroneous. There was evidence tending to support the charge. The striking of this portion of the complaint precluded plaintiffs from offering an instruction relating to the intoxication of defendant and arguing the matter to the jury. The only witnesses testifying to the collision are Turner and the defendant. Their testimony is directly contradictory. The question of defendant's intoxication should have been submitted to the jury. It might have been a controlling factor in the case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

BURKE, P. J., and FRIEND, J., Concur.



109 - A

45479

FRANCES HYMAN,	)	APPEAL FROM
Appellee,)	
v.	)	SUPERIOR COURT
ZACHARY A. BISIG,)	
Appellant.	)	COOK COUNTY.

345 I.A. 415

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$8,000 entered in plaintiff's personal injury action upon a verdict and special interrogatory finding the defendant guilty of wilful, wanton and malicious misconduct. On a former trial the court directed a verdict of not guilty as to the wilful and wanton count and the jury returned a verdict of not guilty. On appeal this court held that the wilful and wanton count should not have been withdrawn from the jury, reversed the judgment and remanded the cause for a new trial. 341 Ill. App. 419 (abst.).

The accident occurred on Irving Park Road between the north and south extensions of north Paulina street from Irving Park, the north extension being to the west of the south extension. Irving Park is a wide street. At the time of the accident there were two streetcar tracks, with a safety island for eastbound passengers located south of the tracks and west of Paulina street on the south. The east end of the safety island for westbound passengers on the north side of the tracks was opposite the west end of the safety island for eastbound passengers. Plaintiff testified that she left her home on the street east of



Paulina and south of Irving Park about one o'clock in the afternoon of September 11, 1947; she walked north to Irving Park and west on the south side of the street to the southwest corner of Irving Park and Paulina; she then crossed to the east end of the safety island on the south of the tracks, intending to cross over the streetcar tracks to the north safety island to take a streetcar going west; she did not intend to take the westbound streetcar then standing at the safety island; she walked west on the south safety island about a quarter of its length and was standing facing northwest; she saw defendant's automobile coming very fast; that some portion of the car hit her on the side, breast and arm, throwing her in the air and down on the safety island. No eyewitness to the accident testified in her behalf. One witness, a young woman who was under a doctor's care for a nervous breakdown, testified that she was sitting at a window at her place of employment eating lunch; that she heard a screeching, saw a woman up in the air and the rear end of a car moving east at a speed estimated by her of between 30 and 40 miles an hour; she had never driven an automobile; it was not until some time after the accident that she thought of the speed of the car; she signed a statement on December 9, 1947 in which she said that she saw the car only after the impact and from the rear only and was not able to judge the speed of the automobile just from seeing it from the rear, but that she got the impression it was going fast; that she could not have known the speed of the automobile in miles per hour on December 9, 1947. The witness

was confused as to the location of the building in which she was working. She first testified that it was on the south side of Irving Park, and, later, that she was not sure. Its location is on the north side of the street. The cross-examination was not completed because of her condition. Another witness, a housewife, testified to having looked out of the window of her home when she heard a loud screaming of brakes, but that she did not see the accident at all. Arthur Schilling, a butcher at 3950 North Ashland, two blocks east of Paulina and near Irving Park, knew plaintiff's husband as a salesman of canned goods and dealt with him. He testified that he was in his automobile following an Irving Park car which stopped at the westbound safety island to receive and discharge passengers, his car being about 12 to 20 feet east of the streetcar and north of the tracks; he saw a woman (plaintiff) on the eastbound safety island and learned her identity about five days later; he saw defendant's automobile when it was about 40 or 60 feet from the safety island; it was approaching swiftly, seemed to sway both ways and was riding in the rails; the south rail of the eastbound track was about 18 inches from the safety island; he could not see how the woman came in contact with the automobile; she was thrown or pitched into the air and landed in the car tracks; her head hit one car rail and her shoulder hit the raised portion of the safety island.

Defendant was the only witness in his behalf. He testified that he was traveling east astride the north rail of the eastbound car line at about 20 miles an hour

1. The first part of the paper is devoted to a general

introduction.

2. The second part is devoted to a detailed

description of the method.

3. The third part is devoted to a discussion

of the results obtained.

4. The fourth part is devoted to a

conclusion.

5. The

6.

7.

8.

9.

10.

11.

12.

13.

14.

15.

16.

17.

18.

19.

20.

21.

22.

as he came up to Paulina; he saw a woman (plaintiff) running at a slow trot between Marshfield and Paulina in line with the eastbound safety island; that he saw this woman when she came up to the safety island, and he went by at 20 miles an hour; the woman was facing west toward him and he did not blow his horn; that no one got in front of his automobile; he had ventilator windows on the automobile, the one on the right being open and extending about five or six inches from the door but not beyond the fenders or the edge of the car; as he went by, the woman passed out of his line of vision; he heard a cracking sound of glass and came to a stop in about 40 feet, in the middle of Paulina east of there; that he did not at any time drive at 30 or 40 miles an hour and that his car could not sway; that his ventilator window was cracked and there was a gooey substance on the front window and lower door panels of the right hand door; that he told the police "She walked into my doors." His left wheel was 4 or 5 inches north of the rail and both right and left wheels were on the cobblestones; he thought the woman was going to get onto the safety island and stay there; she must have turned in her tracks and started walking into his doors; he was a good twelve or more inches from the safety island when he went by there. The evidence on this appeal and the first appeal is in all material matters substantially the same. We are therefore bound by our decision on the first appeal that the issue joined on plaintiff's charge of wilful and wanton conduct was one of fact to be determined by the jury.

Gillum v. Central Illinois Public Service Co., 250 Ill. App.

617. We are not precluded from determining whether the verdict of guilty on that charge is against the manifest weight of the evidence.

In respect to the speed of defendant's automobile the respective statements of plaintiff and her witness Schilling that the automobile was coming very fast or approaching swiftly, is of little value. There is nothing to indicate what speed in miles per hour these witnesses had in mind, or a conflict with defendant's testimony that on approaching the safety island he slowed down from 25 to 20 miles per hour. The testimony of plaintiff's witness who testified that defendant was traveling from 30 to 40 miles per hour is entitled to only enough weight to make the question of speed one of fact for the jury. Her testimony as outlined above shows little qualification for judging speed, little opportunity for observing the speed of the automobile and a confused mind on the witness stand. Plaintiff testified that when standing on the safety island she saw defendant's automobile about ten feet west of her. She does not state how close to the north edge of the island she was standing. Defendant testified that he was driving with the left wheel four or five inches north of the north rail; that the right front ventilator was opened five or six inches but did not extend beyond the fenders or edge of the car, which was a good twelve inches from the safety island. He is corroborated by plaintiff's witness Schilling, who testified that defendant's wheels were in the streetcar rails, the south rail being eighteen inches from the safety island.

Plaintiff and defendant's automobile were each far enough from the north edge of the island that the front of the automobile passed plaintiff without striking her. She came in contact with the automobile at the right ventilator in the front door. There is no testimony as to how the contact happened or what caused it. Plaintiff merely states that she was struck on the side, arm and breast. Defendant says that he saw plaintiff on the island and she passed from his vision as the front of the car passed her. Schilling, who had a clear view of defendant's automobile from the time it was forty to sixty feet west of the safety island, says he could not see how the contact happened. It is purely speculative whether plaintiff, who intended to cross to the safety island north of the streetcar tracks, stepped into the automobile or whether the automobile swerved or swayed more than a foot so that it extended over the safety island and struck plaintiff while standing there. There is no testimony that plaintiff moved or that the automobile left its course. There is the direct testimony of defendant that he was a good twelve or more inches from the safety island when he went by there. The burden was upon plaintiff to show how the contact happened. Casey v. Chicago Railways Co., 269 Ill. 386. The verdict is against the manifest weight of the evidence.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Burke, P.J., and Friend, J., concur.



345 Dec 21 1951
C. W. P. S.

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

2533

During the February Term, A. D., 1951

Term No. 51-O-11

Agenda No. 3

345 I.A. 4761

JOHN T. McPHERSON,)
Administrator of the Estates)
of John McPherson, and Gerald)
McPherson, Deceased, a n d) Appeal from Order
RAYMOND SCHMITT, Adminis-) of the Circuit Court
trator of the Estate of Thomas) of St. Clair County,
Ray Schmitt, Deceased,) Illinois, Granting
Respondents,) Plaintiffs a New
Trial.
- v -)
THE UNIVERSAL C.I.T. CREDIT)
CORPORATION, A Corporation,)
Petitioner,)
and)
MURLIN BANNISTER,
Co-Defendant.

BARDENS, J.

Plaintiffs, as administrators, brought this suit under the Injuries Act to recover for the alleged wrongful death of three children. The deaths resulted from injuries sustained by the three when struck by a car driven by defendant Murlin Bannister on a certain street in the city of East St. Louis, Illinois, on September 11, 1948. The defendant-appellant, Universal C.I.T. Credit Corporation, (hereinafter referred to as "Universal") was made

a defendant and charged with liability on the grounds that at the time of the alleged accident the defendant Bannister was an employee of Universal, authorized and permitted to drive the car which was owned by Universal, and was at that time driving said car in the business of his employer. Universal denied all of the allegations of the complaint and especially denied the agency of the defendant Bannister at the time in question and set up that said defendant Bannister was driving the car at the time on his own personal business and not as an agent of the company.

A trial was had before a jury in the Circuit Court of St. Clair County and resulted in verdicts of not guilty as to both defendants on all three causes of action by the three plaintiffs.

Thereafter, all plaintiffs filed motions for a new trial and at the conclusion of the hearing on these motions, the lower court granted a new trial, setting forth his reasons therefore, in part, as follows: that the verdict was against the manifest weight of the evidence; that the question of agency of the defendant Universal Credit Company was not considered by the jury in reaching a verdict. Universal filed in this court its petition for leave to appeal from the order of the lower court granting a new trial. This petition was allowed and the matter was heard and taken by the court in this term. Defendant Murlin Bannister did not join in the appeal.

Universal, in its brief and argument, states that it does not question the correctness of the order granting the new trial on the issues of negligence, contributory negligence, or causation, but that the only point made is on the question of agency of Bannister.

It is contended by Universal that the verdicts of the jury encompassed all material questions presented by the trial of the case and that the question of agency was therefore passed upon by the jury and that the court abused its discretion in finding that the verdict of the jury was against the manifest weight of the evidence so far as the agency of Bannister for Universal was concerned. Appellant further contends that the trial court's statement of opinion that the question of agency was not considered by the jury was based upon speculation.

It is manifest that in order for the plaintiffs to recover against Universal it was necessary for them to prove not only the agency of the defendant Bannister at the time and place in question but also the liability of the defendant Bannister. When the jury found that the defendant Bannister was not guilty it had no occasion, either by force of logic or law, to consider the question of agency. For this reason we do not agree with the Appellant that the statement of the lower court was based on conjecture.

It is well settled that the trial court is allowed a broad discretion in the granting of new trials. Loucks vs. Pierce, 341 Ill. App. 253. 93 NE 2nd 372. No question is here raised as to the abuse of that discretion in connection with the negligence issue. In connection with the question of agency, we have examined the record and reviewed the abstract of the testimony in this respect and find there was competent evidence on which the jury could have based a finding of agency had they found in plaintiffs' favor on the questions of negligence. For these reasons we do not believe that the lower court committed any abuse of discretion in granting a new trial as to both defendants, but on the contrary feel that his analysis of the situation with regard to the question of agency was correct and should be affirmed.

Order granting new trial affirmed.

Publish abstract only.

Culbertson, P. J. and Scheineman, J. Concur

FILED

JAN 11 1952

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

2543

2543

Agenda No. 10

3 45 I.A. 476²

)

)

) Appeal from the
) Circuit Court of

Circuit Court of
Williamson County,
Missouri

) Illinois.
)

BERTSON, P. J.

This is an appeal by Appellants, LEZERN SAYLOR and RAYMOND MONTGOMERY, as County Commissioners of Williamson County, and SPENCER D. LORTON (hereinafter called defendants) from a judgment of the Circuit Court of Williamson County entered on June 4, 1951, by which judgment the Circuit Court taxed as costs the expense of the report of trial proceedings ordered by defendants in connection with the appeal by defendants from the

decree of the Circuit Court which was entered on June 6, 1950, at the suit of ADOLPH M. SPITZNASS and IRVIN LANG (hereinafter called plaintiffs). The judgment now appealed from was entered on the petition of MARION F. BRADLEY (hereinafter called petitioner), and was entered in favor of plaintiffs and petitioner, in the amount of \$649.07, as against defendants.

The original proceedings between plaintiffs and defendants culminated in a decree entered June 6, 1950, from which injunctive decree, defendants had filed a notice of appeal. Thereafter, a praecipe for record was filed by defendants and defendants requested the report of proceedings in the case. The report of proceedings was procured, together with other portions of the record, and the record, together with the report of proceedings, was filed in the Fourth District Appellate Court. After the filing of the record and abstract and briefs of defendants, the appeal to this Court was dismissed on motion of plaintiffs. The fee bill was thereafter issued by the Clerk of this Court and forwarded to attorneys of record for plaintiffs, but no further steps were taken in connection with the attempted appeal from the injunctive decree referred to. The order dismissing the appeal was entered in this Court on October 18, 1950.

On May 16, 1951 (following the dismissal of the attempted appeal from the injunctive decree),

the petitioner, who is the official court reporter, filed his petition in the Circuit Court of Williamson County in the case and asked the Court to tax as costs in said suit, his costs, charges and expenses for preparation of the report of trial proceedings. There was a recital in the petition to the effect that in such proceeding appellants were ordered by said Circuit Court to deposit with the Clerk of the Court an additional sum of \$1,000.00 to defray the expenses, in addition to the \$500.00 supersedeas bond fixed by the Court, but that defendants had failed to pay the additional sum of \$1,000.00 into Court as ordered. The petition of the reporter to assess the costs alleges that after he had furnished the report of proceedings he rendered his bill for \$841.07 to defendants, but that the bill has not been paid, although the Clerk of the Circuit Court has been paid in full for the common law record in the cause. The petitioner alleges that he is the only officer of the Court who has not been paid his costs in full, and that the matter was pending after the dismissal of the decree by the Appellate Court, and that the Circuit Court of Williamson County had full power to enter judgment for whatever costs were found to be due and unpaid. Upon such 16th day of May, 1951. and immediately upon the filing of the petition, the Judge of the Williamson County Circuit Court entered an order that the Clerk notify all parties of record that a hearing had been set on such petition for June 1, 1951.

On May 31, 1951 defendants filed in this cause their verified application and affidavit for a change of venue from the Judge then presiding, Lloyd M. Bradley, in which affidavit and application for change of venue, they requested a change of venue from said Judge in the matter of the hearing upon the petition of the Court Reporter, on the ground of alleged prejudice against them of the said Judge Bradley. The petition alleged that the said petitioner, Marion F. Bradley, is the court reporter who was appointed by and was working under the direction of the said Judge Bradley; that the petitioner, Marion F. Bradley, is the son of the said Judge Bradley; and that the defendants learned for the first time on May 29, 1951 that the said Judge Bradley was going to hear and determine the petition of the said petitioner, Marion F. Bradley; that a different Judge had been presiding at said May, 1951 Term of said Court; and that they immediately caused notice of intention to apply for change of venue from the said Judge Bradley to be given to the attorney of record for the said Marion F. Bradley; and that the application and affidavit for change of venue was made promptly thereafter. The affidavit and application were properly verified. ✓

On June 1, 1951 the affidavit and application for change of venue were presented to Judge Bradley prior to his calling said petition to assess costs for hearing, and the said Judge Bradley found that

said application came "too late"; that it was not made in good faith, but merely for delay; and he thereafter overruled and denied the application; and thereafter denied a motion to strike the petition which raised grounds to the effect that the said petitioner was not a party plaintiff or defendant in the cause and had no standing in said cause whatsoever for such petition; and that the reporter's fees are not proper costs, as a matter of law, which may be taxed as costs in the proceeding. Thereafter, a hearing was had on the petition, and Judge Bradley, at the conclusion of the hearing, entered judgment taxing the court reporter's fees in the sum of \$649.07, and entered judgment in favor of plaintiffs and the petitioner Marion F. Bradley in such sum, and ordered execution thereon. After the entry of said judgment all plaintiffs filed in the Circuit Court of Williamson County their disclaimer of any and all interest in the said judgment and plaintiffs alleged they have no interest in the fund and request that no part of any costs involved in the petition of the Court Reporter be assessed as against them, and likewise, assert that they are nominal parties only. It is from the judgment of the Circuit Court following the petition of said Court Reporter that this appeal is taken.

On appeal in this Court defendants contend that the Court below improperly denied the application for change of venue. A number of other grounds

are likewise set forth, notably, that the Court Reporter had no status in the proceeding as a party, and that his claim for fees and costs of the report of proceedings was not an item taxable as costs under the law.

It is the contention of petitioner in this Court that the judgment entered in this cause was solely for costs and therefore is not appealable, and that the appeal should be dismissed, and that the fees of the official court reporter for making the transcript being required to be paid in the first instance by the party in whose behalf such transcript is ordered, should be taxed as costs in the suit. It is also the contention of such petitioner that the application for change of venue, under the facts was made too late.

Since the proceeding which culminated in injunctive relief became final and since the reporter had no interest in the subject matter of such litigation, his intervention in the suit was not authorized by law, and the petition assessing costs clearly should have been stricken (HAASE vs. HAASE, 261 Ill. 30; GROVES vs. FARMERS STATE BANK OF WOODLAWN, 368 Ill. 35). The statutes authorizing taxing of expenses as costs are to be strictly construed, and such expenses could be taxed as costs only in accordance with the provisions of the statute (WINTERSTEEN vs. NATIONAL COOPERAGE & WOODENWARE CO., 361 Ill. 95; GOUDY, ET AL. vs. MAYBURY, 272 Ill. 54). We

find no basis in the statutes or precedents for allowing the Reporter to have a specific recovery for costs, individually, through intervention in the proceeding, since the statute authorizing the taxing of costs specifies that the cost of the report of proceedings is, in the first instance, to be paid by the party ordering the same, and thereafter, taxed as costs, (1951 ILLINOIS REVISED STATUTES, Chapter 37, Section 163 B). 11

The application for change of venue was likewise made in timely fashion, under the facts, on grounds of prejudice of the Circuit Judge as against defendants, and the relationship of father and son between the Judge and the Official Reporter. The Court under the circumstances was without authority to enter any further orders, except in connection with such change, and the change of venue should have been granted (1951 ILLINOIS REVISED STATUTES, Chapter 116, Section 1; PEOPLE vs. SCOTT, 326 Ill. 327). Under the facts this case is distinguishable from cases where the sole issue was the determination of costs and where appeal was accordingly dismissed. The question of the right to intervene, of the propriety of entry of order on change of venue, and of proceedings pursuant to the petition of the intervening court reporter, were all matters for determination, and furnished a proper basis for appeal.

In view of the conclusions of this Court the order and judgment of the Circuit Court of Williamson County on the petition of the said Marion F. Bradley is hereby reversed.

Reversed.

Bardens, J., and Scheineman, J., concur.

(Publish in Abstract only)

- 8 -

FILED

JAN 16 1952

David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

2563

A

Abstract

Gen. No. 10524. Agenda No. 28.

IN THE 345 I.A. 477¹
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A. D. 1951.

FRANCKE ERICKSEN d/b/a)	
FRANCKE ERICKSEN AND CO.,)	
Appellant,	)	Appeal from the
	)	Circuit Court of
vs.	)	DuPage County.
)	
CHARLES H. HOLDEN, et al.,)	
Appellees.)	

WOLFE,-- J.

Francke Ericksen doing business as Francke Ericksen and Company, filed a claim to enforce a Mechanic's Lien in the Circuit Court of DuPage County against the property of Charles H. Holden and Caroline Holden. The Holdens had contracted with Oscar Tonnesen who is a general contractor, to build them a new home. The Ericksens were in the painting business and had a subcontract to do this work on the Holden house. The contract between the Holdens and Tonnesens was for a completed house for \$26,300.00. The outside was to have three coats of paint and the inside two.

The case was referred to the master in chancery to hear the testimony, and file his conclusions both of law and fact. He reported to the Court that the house had been completed in May 1949; that on the 18th day of August 1949 the Ericksens

100-10000

100-10000 100-10000

100-10000 100-10000
100-10000 100-10000
100-10000 100-10000

100-10000 100-10000
100-10000 100-10000

100-10000 100-10000
100-10000 100-10000

100-10000 100-10000
100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

100-10000 100-10000

2.

went upon the premises and did some painting on the shutters of the house. Before this the Ericksens had had a conversation with Mrs. Holden and she told them that the house was completed and there was nothing further for them to do, but Erickson sent a man to the Holden property and had him apply some paint upon the shutters; how much does not appear from the evidence.

On August 19, 1949, the Ericksens filed their claim for a Mechanic's Lien against the Holden property. On August 17th Oscar Tonnesen was declared a bankrupt and on the same day a notice of the same was sent to the Ericksens, but it is claimed that it did not reach Erickson until after the painting was done to the shutters. Mrs. Holden also told Erickson that the job was completed and that his workmen could not come upon the place.

The Court sustained the master's report and entered a judgment denying the plaintiff a lien as prayed for in the petition, and the case was brought to this Court for a review. The master who sees and hears the witnesses testify, his findings has considerable weight both with the trial Court and the Court of review in passing upon the facts. From a review of the evidence, it is our conclusion that it sustains the master's findings. As before stated how much, or the value of the painting that was done on August the 18th, does not appear from the record.

The evidence fairly supports the master's conclusion that the work was completed on May 6, 1949, and the plaintiff had delayed too long in filing his claim for a Mechanic's Lien, therefore we find that the judgment of the trial court should be affirmed.

Judgment affirmed.

2573

Abstract

Gen. No. 10536

Agenda No. 31.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

OCTOBER TERM, A. D. 1951.

345 I.A. 477²

HIGO CHITJIAN,
Appellant (Plaintiff),

vs.

BETTY BUCHOLZ;
and ALBERT HULQUIST, individually
and trading as AL'S WHITE HOUSE,
Appellees (Defendants).

)
)
) Appeal from Judgment
) of Circuit Court
) McHenry County.
)
)
)

WOLFE,-- J.

This is an appeal from the order of the Circuit Court of McHenry County, instructing the jury to find the defendant not guilty in a personal injury suit. It appears that Higo Chitjian was riding as a guest in the automobile of Betty Bucholz and that Betty Bucholz became sleepy and drowsy while driving, and lost control of the car and Higo Chitjian was injured. The complaint charges that the defendant was guilty of willful and wanton conduct which was the cause of the injuries to the plaintiff.

Considerable evidence was heard on behalf of the plaintiff and there was no dispute but that Betty Bucholz, while driving the car, momentarily dozed off and the car hit some gravel, ran onto a bank and that Chitjian was injured. At the

42
4
10

Abstract

Con. No. 10536
Appended to 37.

IN THE

APPELLATE COURT OF THE STATE

SECOND DISTRICT.

OCTOBER TERM, A. D. 1937.

HUGO CHITLIAN, (Plaintiff),
vs. (Appellee)
BETTY BUCHOLZ;
and ALBERT BUCHOLZ, individually
and trading as AL'S WHITE HOUSE,
(Defendants).
(Appellees)

Appeal from judgment
of Circuit Court
of Henry County.

WOLFE, -- J.

This is an appeal from the order of the Circuit Court of Henry County, instructing the jury to find the defendant not guilty in a personal injury suit. It appears that Hugo Chitlian was riding as a guest in the automobile of Betty Bucholz and that Betty Bucholz became sleepy and drowsy while driving, and lost control of the car and Hugo Chitlian was injured. The complaint charges that the defendant was guilty of willful and wanton conduct which was the cause of the injuries to the plaintiff.

Considerable evidence was heard on behalf of the plaintiff and there was no dispute but that Betty Bucholz, while driving the car, momentarily coasted off and the car hit some gravel, ran onto a bank and that Chitlian was injured. At the

close of the evidence, the defendants made a motion for a directed verdict, which the Court sustained, and directed the jury to find the defendants not guilty. The jury so found. The Court entered judgment against the plaintiff. It is from this judgment that this appeal has been perfected.

It is contended by the appellant that the question of whether the defendant was guilty of willful and wanton conduct in driving while asleep, or her eyes were closed and permitting her automobile to go off the road on the left-hand side of the highway, and crashing into a ditch and injuring the plaintiff, is a question of fact that should have been submitted to a jury.

It is a well-settled proposition of law that in considering a motion for a directed verdict only the evidence submitted on behalf of the plaintiff can be considered, and if there is any evidence tending to show that the defendant was guilty of willful and wanton conduct that would entitle the plaintiff to recover, the Court cannot properly take the case from the jury, but must submit these questions of fact to it for its consideration.

The same question was presented to this Court in the case of *Secrist vs. Raffleson*, 326 Ill. App. 489. We there held that the case was properly submitted to the jury and sustained the verdict and judgment. We cited the cases of *Tennes vs. Tennes*, 320 Ill. App. 19; *Marks vs. Marks*, 308 Ill. 276; *Barmann vs. McConachie*, 289 Ill. App. 196. These cases are all very similar to the one in question and involved the question of the driver of the automobile falling asleep and losing control of his auto and injuring the plaintiff. These cases all held

close of the evidence, the defendants made a motion for a directed verdict, which the Court sustained, and directed the jury to find the defendants not guilty. The jury so found. The Court entered judgment against the plaintiff. It is from this judgment that this appeal has been perfected.

It is contended by the appellant that the question of whether the defendant was guilty of willful and wanton conduct in driving while asleep, or her eyes were closed and permitting her automobile to go off the road on the left-hand side of the highway, and crashing into a ditch and injuring the plaintiff, is a question of fact that should have been submitted to a jury. It is a well-settled proposition of law that in considering

the question of a directed verdict only the evidence submitted on behalf of the plaintiff can be considered, and if there is any evidence tending to show that the defendant was guilty of willful and wanton conduct that would entitle the plaintiff to recover, the Court cannot properly take the case from the jury, but must submit these questions of fact to it for its consideration.

The same question was presented to this Court in the case of *Scott v. Kellison*, 226 Ill. App. 499. We there held that the case was properly submitted to the jury and sustained the verdict and judgment. We cited the case of *Tombs v. Tombs*, 320 Ill. App. 19; *Wark v. Wark*, 306 Ill. 276; *Berman v. McGonigle*, 249 Ill. App. 196. These cases are all very similar to the one in question and involved the question of the driver of the automobile falling asleep and losing control of his auto and injuring the plaintiff. These cases all hold

3.

that such conduct constituted willful and wanton misconduct, as defined by our Injuries Act Statute.

From a review of the evidence as abstracted, it is our conclusion that there was sufficient evidence of willful and wanton misconduct on the part of the defendant to go to the jury for their consideration, and the Court erred in instructing the jury to find the defendants not guilty. The case is reversed and remanded to the Circuit Court.

Reversed and remanded.

that such conduct constituted willful and wanton misconduct,
as defined by our Indiana Act Statute.

From a review of the evidence as abstracted, it is our
conclusion that there was sufficient evidence of willful and
wanton misconduct on the part of the defendant to go to the
jury for their consideration, and the Court erred in instructing
the jury to find the defendant not guilty. The case is reversed
and remanded to the Circuit Court.

Reversed and remanded.

OK. 267. H.

2583

Abstract

Gen. No. 10419

Agenda No. 36

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1951

345 I.A. 478

ARTHUR WILSON,)	
Plaintiff-Appellant,	)	Appeal from the
)	
vs.	)	Circuit Court,
)	
KANKAKEE DAILY JOURNAL COMPANY,	)	Kankakee County.
a corporation,)	
Defendant-Appellee.))	

ANDERSON -- J.

Arthur Wilson, plaintiff-appellant, filed his suit for libel against the Kankakee Daily Journal Company, defendant-appellee, in the Circuit Court of Kankakee County. On motion to dismiss the complaint, the trial court dismissed the same finding that the alleged libelous language as averred in the complaint was not libelous. The plaintiff-appellant elected to stand on the complaint, and this appeal follows.

Arthur Wilson, the appellant herein, at or about the time the instant case was filed, filed his suit for libel against the United Press Association in the Circuit Court of Cook County. The libel alleged to have been committed by the United Press Association consisted of the publication of the same article that was published in the instant case, and published in the same newspaper, the Kankakee Daily Journal Company. The article was prepared by the United Press Association, and sent to various newspapers in the State of Illinois for publication, including the Kankakee Daily Journal Company at Kankakee, Illinois.

3451.A.478

IN THE
CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
DOCKET NO. 10,191

Gen. No. 10119 Appellate No. 36

APPELLANT,)
ARTHUR L. WILSON,)
Plaintiff-Appellant,)
vs.)
KANKAKEE DAILY JOURNAL COMPANY,)
a corporation,)
Defendant-Appellee.)
Kankakee County,
Illinois,)
Circuit Court,
Appellate from the

ARTHUR L. WILSON, Plaintiff-Appellant, filed his writ for libel against the Kankakee Daily Journal Company, Defendant-Appellee, in the Circuit Court of Kankakee County. On motion to dismiss the complaint, the trial court dismissed the same finding that the alleged libelous language as averred in the complaint was not libelous. The Plaintiff-Appellant elected to stand on the complaint, and this appeal follows.

ARTHUR WILSON, the appellant herein, at or about the time the instant case was filed, filed his writ for libel against the United Press Association in the Circuit Court of Cook County. The libel alleged to have been committed by the United Press Association consisted of the publication of the same article that was published in the instant case, and published in the same newspaper, the Kankakee Daily Journal Company. The article was prepared by the United Press Association, and sent to various newspapers in the State of Illinois for publication, including the Kankakee Daily Journal Company at Kankakee, Illinois.

The trial judge in the United Press Association case, on motion to strike the complaint, struck the complaint as not stating a cause of action, and the plaintiff elected to stand on his complaint, judgment being entered to dismiss the ~~Suit~~ at plaintiff's costs. From this ruling an appeal was taken by Arthur Wilson to the Second Division of the Illinois Appellate Court for the First District. The Appellate Court of the First District decided that the trial court was correct in dismissing the complaint, and affirmed the judgment of the trial court. This case is entitled Wilson vs. United Press Assoc., and is reported in 343 Ill. App. 238. The Supreme Court denied leave to appeal (344 Ill. App. 11). The alleged libel in both cases is identical. Its publication is admitted in both cases. //

Arthur V. Wilson in the instant case and the United Press Assoc. case, supra, admitted that all the facts in the article were true except that he had ever served any time in the penitentiary. It was admitted that he had been out on bail pending the writ of error sued out to review his conviction in the Supreme Court. He urged in the United Press Association case and in this case that this misstatement that he had been in the penitentiary was libelous per se. The Appellate Court of the First District in the United Press Association case, supra, stated that the Press Association had correctly reported the news item that Arthur Wilson had been improperly convicted and had been granted a new trial. They further stated that whether or not he was serving his sentence or was free on bail was of secondary importance, and that the United Press release and the Kankakee Daily Journal dispatch, as a matter of fact, constituted accurate reportage of the Supreme Court opinion. The Appellate Court of the First District held in substance that the plaintiff, Wilson, under the admitted facts,

The trial judge in the United Press Association case, on motion to strike the complaint, struck the complaint as not stating a cause of action, and the plaintiff elected to stand on his complaint, but was later entered to dismiss the suit at plaintiff's costs. From this ruling an appeal was taken by United Press to the Second Division of the Illinois Appellate Court for the First District. The Appellate Court of the First District held that the trial court was correct in dismissing the complaint, and affirmed the judgment of the trial court. This case is entitled *United Press v. United Press Assoc.*, and is reported in 311 Ill. App. 2d. The Supreme Court failed to leave the appeal (311 Ill. App. 2d). The alleged libel in both cases is identical. The publication is admitted in both cases. *United Press v. United Press Assoc.* and the *United Press Assoc.* case, supra, admitted that all the facts in the article were true except that he had never served any time in the penitentiary. It was admitted that he had been out on bail pending the writ of error and out to review his conviction in the Supreme Court. He argued in the United Press Association case and in this case that this misstatement that he had been in the penitentiary was libelous per se. The Appellate Court of the First District in the *United Press Association case*, supra, stated that the Press Association had correctly reported the news item that United Press had been improperly convicted and had been granted a new trial. They further stated that whether or not he was serving his sentence or was free on bail was of secondary importance, and that the United Press release and the *Kansas City Journal* libelous, as a matter of fact, constituted accurate reports of the Supreme Court opinion. The Appellate Court of the First District held in substance that the plaintiff, United Press, under the admitted facts,

could not be injured by the erroneous statement that he was serving a sentence in the penitentiary pending his appeal, and therefore the complaint in libel did not state a cause of action.

It is our opinion that the reasoning and the law as announced in the United Press Association case, supra, are correct and should be followed here. The trial court was correct in dismissing the complaint, and the judgment of the trial court should be affirmed.

Accordingly, the judgment of the trial court in the instant case should be and is affirmed.

Judgment affirmed,

could not be proved in the evidence presented that he was serving a term
in the penitentiary at the time of the murder, and therefore the conviction
is based on the fact of a crime of violence.

It is the opinion of the court that the fact of a crime of violence is

the only fact necessary to prove, and the fact of a crime of violence is

proved. The trial court was correct in its ruling on this point, and the

judgment of the trial court should be affirmed.

Accordingly, the judgment of the trial court is affirmed and the

case is remanded to the trial court.

Very truly yours,
J. Edgar Hoover

0745-
2025-

2593

Abstract

Gen. No. 10542

Agenda No. 15

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, 1951

345 I.A. 479¹

JAMES RICE,)
Petitioner-Appellant,)
vs.)
BOARD OF FIRE AND POLICE COMMISSIONERS)
OF THE CITY OF PEORIA, ILLINOIS, a)
Municipal Corporation; JOHN M.)
McCARTHY, JR., IRA JOHNSTON, CAMERON)
C. HUMESTON, BOARD OF TRUSTEES OF)
THE FIREMEN'S PENSION FUND, S. PAUL)
FERRIN, FRANCIS NASH, ELSIE B.)
ARENDIS, DAN P. DONAHUE, JOHN CHRIS-)
TIAN, EMMETT J. DUNNE, CHARLES M.)
CONNELLY, RUDOLPH F. KNEER,)
Respondents-Appellees.)

Appeal to the Appellate Court
of Illinois, Second District,
from the Circuit Court
of Peoria County,
Illinois.

ANDERSON -- J.

On May 11, 1940, in the Circuit Court of Peoria County, James Rice, petitioner and appellant herein, by his attorney, George W. Sprenger, filed his petition for a writ of certiorari directed against the Board of Fire and Police Commissioners, City of Peoria, Illinois, respondents and appellees, alleging he had been unlawfully discharged as a Fireman for the City of Peoria. On May 22, 1940, the respondent filed a motion to quash the petition. In 1946, petitioner, by his then attorney, George W. Sprenger, asked and obtained leave of court to file an amended complaint. This was never filed. On December 22, 1949, Cassidy, Sloan, and Crutcher entered their appearance as attorneys for the plaintiff, and obtained leave of court to file an amended petition instanter. On January 13, 1950, the respondents

OFFICE OF THE CLERK OF THE COURT

1925

State of Illinois,
County of Cook,
Circuit Court.
In the case of
The People of the State of Illinois,
Plaintiff,
vs.
The People of the State of Illinois,
Defendant.

Petitioner-Defendant,
The People of the State of Illinois,
County of Cook,
Circuit Court.
In the case of
The People of the State of Illinois,
Plaintiff,
vs.
The People of the State of Illinois,
Defendant.

1925

On May 11, 1925, in the Circuit Court of Cook County, Illinois, the
petitioner and defendant, The People of the State of Illinois, filed
his petition for a writ of certiorari directed against the Board of
and Police Commissioners, City of Chicago, Illinois, respondents and
also, alleging he had been unlawfully discharged as a fireman for the City
of Chicago. On May 22, 1925, the respondent filed a motion to quash the
petition. In 1925, petitioner, by his then attorney, George W. Berger,
moved and obtained leave of court to file an amended complaint. This was
never filed. On October 22, 1925, George W. Berger, then and thereafter
their successors as attorneys for the plaintiff, and obtained leave of court
to file an amended petition instead. On January 13, 1926, the respondent

filed their motion to dismiss the first amended petition for the reasons assigned in their former motion to dismiss and for the further reason that the petitioner has been guilty of laches. The Board of Trustees of the Firemen's Pension Fund, who were made additional parties respondent⁷ in the first amended complaint, filed a like motion to dismiss on February 24, 1950. On April 10, 1950, the petitioner by his present attorneys, obtained leave of court and filed an answer to the motions of the respondents to dismiss. On February 16, 1951, the petitioner, over objection of respondents' counsel, was granted leave and filed on that date his second amended petition for a writ of certiorari. The court ordered that all motions previously filed by any and all of the defendants should stand as motions against the second amended petition. On March 16, 1951, the trial court, after a hearing on the petitions and the motions, entered an order quashing the original petition and the first and second amended petitions for the writ of certiorari. James Rice, petitioner-appellant, has appealed from these orders.

Answer
2nd Am
8.5

It is unnecessary, except for the question of laches, hereafter discussed, to analyze and discuss the sufficiency of the original and first amended petitions for the writs of certiorari, as the petitioner, by obtaining leave of court to file his second amended petition, in legal effect, has abandoned the other petitions.

X

The second amended petition alleges in substance that prior to 1940 the petitioner was employed as a fireman by the City of Peoria, having passed an examination given him by the Board of Fire and Police Commissioners of the said city. In 1937, after having been let out of the department, he was appointed and qualified as a fireman. Petition further alleges that about March 15, 1940, without his being present and without written charges being filed against him, the Board of Fire and Police Commissioners, respondents herein, held a hearing as to whether or not he should be discharged;

filed their motion to dismiss the first amended petition for the reasons assigned in their former motion to dismiss and for the further reason that the petitioner has been guilty of laches. The Board of Trustees of the Women's Pension Fund, who were made additional parties respondent in the first amended complaint, filed a like motion to dismiss on February 24, 1937. On April 10, 1937, the petitioner by his present attorneys, obtained leave of court and filed an answer to the motions of the respondents to dismiss. On February 16, 1937, the petitioner, over objection of respondents' counsel, was granted leave and filed on that date his second amended petition for a writ of certiorari. The court ordered that all motions previously filed by any and all of the defendants should stand as motions against the second amended petition. On March 16, 1937, the trial court, after a hearing on the petitions and the motions, entered an order quashing the original petition and the first and second amended petitions for the writ of certiorari. James Rice, petitioner-appellant, has appealed from these orders. It is unnecessary, except for the question of laches, hereafter discussed, to analyze and discuss the sufficiency of the original and first amended petitions for the writs of certiorari, as the petitioner, by obtaining leave of court to file his second amended petition, in legal effect, has abandoned the other petitions. The second amended petition alleges in substance that prior to 1930 the petitioner was employed as a fireman by the City of Detroit, having passed an examination given him by the Board of Fire and Police Commissioners of the said city. In 1937, after having been let out of the department, he was appointed and qualified as a fireman. Petitioner further alleges that about March 15, 1940, without his being present and without written charges being filed against him, the Board of Fire and Police Commissioners, respondents herein, held a hearing as to whether or not he should be discharged;

that the hearing was continued to April 2, 1940, and still no written charges were filed or made against him, but he appeared at the hearing and was questioned by the commissioners, and from such questioning he learned that the inquiry was whether or not he had been drinking on duty on February 21, 1940; that on April 13, 1940, he received a letter from the Board stating he was dismissed. Petitioner further alleges that the meetings above mentioned were so conducted that he had no opportunity to have the substance of the rules governing his trial preserved; that he was denied a fair hearing; denied an opportunity to be heard in his own defense; and that the commission at the said hearings admitted incompetent, hearsay testimony, and refused to admit competent evidence offered by him. Petitioner further alleges that he was not guilty of the charges; that the commission was without jurisdiction; and that they illegally discharged him. The petition further states the names of the present members of the Board of Fire and Police Commissioners. Rice further avers that he has a substantial interest in the Firemen's Pension Fund of the City of Peoria, and that the trustees of the said fund, who are also made respondents to this petition, refuse to recognize any interest he has in the funds. Petition further prays that a writ of certiorari issue, directing all the respondents to bring into court the record of the proceedings of the commission; that the record of the proceedings be set aside; and that the trustees of the pension fund be required to reinstate the petitioner. The rights of petitioner for reinstatement stem from the provisions of the statute (Ill. Rev. Stat. 1949, chap. 24, par. 14-11) in force in 1940.

The answer to the motions of the respondents to dismiss the second amended petition is in substance as follows. It alleges that after the petitioner was discharged by the city, he retained George W. Sprenger as his attorney and he filed the first petition for the writ; that thereafter

that the hearing was continued to April 2, 1940, and still no written charges

were filed or made against him, but he appeared at the hearing and was questioned by the commissioner, and from such questioning he learned that the inquiry was whether or not he had been drinking on duty on February 21, 1940; that on April 13, 1940, he received a letter from the board stating he was dismissed. Petitioner further alleges that the meetings above mentioned were so conducted that he had no opportunity to have the substance of the rules governing his trial preserved; that he was denied a fair hearing;

denied an opportunity to be heard in his own defense; and that the commission at the said hearings admitted incompetent, hearsay testimony, and refused to admit competent evidence offered by him. Petitioner further alleges that he was not guilty of the charges; that the commission was without jurisdiction; and that they illegally absconded with him. The petition further states the names of the present members of the Board of Fire and Police Commissioners. Petitioner further avers that he has a substantial interest in the Fireman's Pension Fund of the City of Peoria, and that the trustees of the said fund, who are also respondents to this petition, refuse to recognize any interest he has in the funds. Petitioner further prays that a writ of certiorari issue, directing all the respondents to bring into court the record of the proceedings of the commission; that the record of the proceedings be set aside; and that the trustees of the pension fund be required to reinstate the petitioner. The rights of petitioner for reinstatement stem from the provisions of the statute (Ill. Rev. Stat. 1937, Chap. 24, par. 14-15) in force in 1940.

The answer to the motions of the respondents to dismiss the second amended petition is in substance as follows. It alleged that after the petitioner was discharged by the city, he retained George W. Springer as his attorney and he filed the first petition for the writ; that thereafter

George W. Sprenger on numerous occasions negotiated with the City in attempting to reach a settlement with them; that from 1940 until 1947 Sprenger was ill and incapacitated to carry on the practice of law; that in 1947 petitioner discharged Sprenger and consulted and employed Cassidy, Sloan, and Crutcher as his attorneys; that Mr. Crutcher, a member of the firm, negotiated with the then corporation counsel on at least twelve or fifteen occasions, trying to settle the case; that the negotiations were carried on in 1947, 1948, and the early part of 1949; that in the early part of 1949 the corporation counsel declined to further discuss the case, pending a change in the City's administration; that after the change of administration Crutcher consulted with the then corporation counsel, appeared before one of the defendant's boards, and discussed settlement at some length; that he had had various conferences with the corporation counsel of the City of Peoria, and that just proposals of settlement were made and considered. Finally late in December, 1949, he decided that the matter could not be settled. After it became apparent that a settlement could not be reached, the motions to which this is an answer were filed. Petitioner in his answer further stated that he never at any time abandoned the prosecution of the proceedings, nor did his attorney abandon them. At all times he and his attorney and representatives of the City of Peoria intended to bring this matter to a hearing if it was impossible to obtain settlement. This answer is verified by the affidavit of Stanley W. Crutcher, his attorney.

The question presented here is does the second amended petition, considered with the answer to the motion to dismiss the petition, state a cause of action? No return was filed by the respondents, no evidence heard by the court; so the cause of action of the petitioner must stand or fall on the pleadings. In order to determine this question it is necessary to analyze the second amended complaint, and the answer filed by the petitioner to the motion to dismiss the same. It is elementary and needs no citation

George L. Springer on numerous occasions negotiated with the City in attempt-
ing to reach a settlement with them; that from 1910 until 1917 Springer
was ill and incapable to carry on the practice of law; that in 1917
petitioner discharged Springer and consulted and employed Grutcher, Sloan,
and Grutcher as his attorneys; that Mr. Grutcher, a member of the firm,
negotiated with the then corporation counsel on at least twelve or fifteen
occasions, trying to settle the case; that the negotiations were carried
on in 1917, 1918, and the early part of 1919; that in the early part of
1919 the corporation counsel declined to further discuss the case, pending
a change in the City's administration; that after the change of administra-
tion Grutcher consulted with the then corporation counsel, discussed before
one of the defendant's boards, and discussed settlement of the case;
that he had had various conferences with the corporation counsel of the
City of Peoria, and that just proposals of settlement were made and considered.
Finally late in December, 1919, he decided that the matter could not be
settled. After it became apparent that a settlement could not be reached,
the motions to which this is an answer were filed. Petitioner in his answer
further stated that he never at any time abandoned the prosecution of the
proceedings, nor did his attorney abandon them. At all times he and his
attorney and representatives of the City of Peoria intended to bring this
matter to a hearing if it was impossible to obtain settlement. This answer
is verified by the affidavit of Stanley L. Grutcher, his attorney.
The question presented here is not the second amended petition, con-
sidered with the answer to the motion to dismiss the petition, state a
cause of action. No return was filed by the respondents, no evidence heard
by the court; so the case of action of the petitioner must stand or fall
on the pleadings. In order to determine this question it is necessary to
analyze the second amended complaint, and the answer filed by the petitioner
to the motion to dismiss the same. It is elementary and needs no citation

of authority that the party who files a motion to dismiss a petition or complaint, admits all facts well-pleaded to be true. No motion to dismiss or strike the answer of the petitioner was made, and for the same reasons all facts well-pleaded in the answer are likewise admitted to be true. X

Appellees urge in their argument that the first amended petition was not sworn to, and therefore was insufficient. This is immaterial, as the proceedings are being determined on the sufficiency of the second amended complaint, which was verified. Appellees contend for various reasons that the original petition and first amended petition were not sufficient. These propositions need not be considered for the reasons above announced. There is some question urged by appellees that the board as a board is an improper respondent. This would not be ground for dismissing the petition, but only for dismissing the misjoined party on proper motion. (Hitchcock vs. Reynolds, 278 Ill. App. 559.)

The second amended complaint alleges that the petitioner was a de jure officer; so the motion to quash raised by appellees on the ground that he was not a de jure officer is not tenable. (Reed vs. City of Peoria, 318 Ill. App. 271.)

It is our opinion for the above reasons that all other objections to the proceedings as urged by the appellees except the question of laches are without merit. {

The most important question to be solved is whether or not the second amended petition should have been dismissed on the ground of laches for want of diligence in prosecuting the same. The law is well settled in this State that a petition for a writ of certiorari to restore a public official alleged to have been wrongfully discharged who is under civil service must be filed in the proper court by the person injured within six months from the date of his alleged unlawful discharge unless the delay is satisfactorily //

X
of authority that the party who files a motion to dismiss a petition or
complaint, admits all facts well-pleaded to be true. A motion to dismiss
or strike the answer of the petitioner was made, and for the same reasons
all facts well-pleaded in the answer are likewise admitted to be true.
Appellees urge in their argument that the first amended petition was
not sworn to, and therefore was insufficient. This is immaterial, as the
proceedings are being determined on the sufficiency of the second amended
complaint, which was verified. Appellees contend for various reasons that
the original petition and first amended petition were not sufficient. These
propositions need not be considered for the reasons above mentioned. There
is some question urged by appellees that the bond as a bond is an improper
respondent. This would not be ground for dismissing the petition, but only
for dismissing the rejoinder, under proper motion. (Hitchcock vs. Perkins,

223 Ill. App. 250.)

The second amended complaint alleges that the petitioner was a de jure
officer; so the motion to quash raised by appellees on the ground that he
was not a de jure officer is not tenable. (Lead vs. City of Peoria, 218

Ill. App. 271.)

It is our opinion for the above reasons that all other objections to
the proceedings as urged by the appellees except the question of facts are
without merit.

The most important question to be solved is whether or not the second
amended petition should have been dismissed on the ground of facts for
want of diligence in prosecuting the same. The law is well settled in this
State that a petition for a writ of certiorari to restore a public official
alleged to have been wrongfully removed who is under civil process must
be filed in the proper court by the return of the writ within six months from
the date of his alleged unlawful discharge unless the delay is satisfactorily

explained. The court in its discretion may refuse to grant the writ or may quash the writ if it appears that it has not been filed in such time. (Kenneally vs. City of Chicago, 220 Ill. 435; City of Chicago vs. Condell, 224 Ill. 595; Blake vs. Lindblom, 225 Ill. 555; People vs. Burdette, 285 Ill. 48; Carroll vs. Houston, 341 Ill. 531; and Connolly vs. Upham, 340 Ill. App. 387)

Thus in *City of Chicago vs. Condell*, *supra*, where two years elapsed from the time of the alleged wrongful discharge and the filing of the petition for certiorari, and where the petitioner sought to avoid the above rule on the ground that he had consulted an attorney who told the petitioner that he had no remedy, the court held the writ should have been quashed and the petition dismissed. The court says on page 598 of the opinion:

"But where a detriment or inconvenience to the public will result, the party is required to account speedily in making his application. Any unreasonable delay will warrant the refusal of the writ."

The doctrine of laches may be applied to certiorari proceedings although it is an action at law. (*Schultheis vs. City of Chicago*, 240 Ill. 167.)

Other reasons why the writ may be denied or quashed in the discretion of the court where the petitioner has delayed unreasonably, are that public detriment or inconvenience may result in the issuance of the writ or its failure to quash the same (*Carroll vs. Houston*, *supra*), or that due to the delay, the petitioner may cause the municipality financial loss by reason of the fact that his office has been filled by another party who is receiving salary for it, and that the municipality may be required to reimburse the wrongfully discharged party for services which he has never performed, and thereby cause serious financial difficulty to the municipality. (*Carroll vs. Houston*, *supra*; and *Connolly vs. Upham*, *supra*.)

These rules of law as announced by the above cases have little application to the question of laches or lack of diligence in the prosecution of the suit in the instant case, as in all of them the petition was not filed

explained. The court in the *Marston* case seems to grant the writ on any case the writ is it appears that it has not been filed in such time. (Kennedy vs. City of Chicago, 230 Ill. 185; City of Chicago vs. Conkell, 234 Ill. 295; 71 Mo. vs. Lincoln, 235 Ill. 755; People vs. Brewster, 235 Ill. 185; Conkell vs. Weston, 341 Ill. 231; and Conkell vs. Weston, 340 Ill. 337)

Thus in *City of Chicago vs. Conkell*, supra, where two years elapsed from the time of the alleged wrongful discharge and the filing of the petition for certiorari, and where the petitioner sought to avoid the above rule on the ground that he had consulted an attorney who told the petitioner that he had no remedy, the court held the writ should have been granted and the

petition dismissed. The court says on page 238 of the opinion: "But where a detriment or inconvenience to the public will result, the writ is required to issue, thereby to bring the petitioner, by an unreasonable delay will warrant the refusal of the writ."

The doctrine of *Marston* may be applied to certiorari proceedings although it is an action at law. (Conkell vs. City of Chicago, 340 Ill. 187.)

Other reasons why the writ may be denied or granted in the *Marston* case of the court where the petitioner has delayed unreasonably, and that public detriment or inconvenience may result in the issuance of the writ or its failure to grant the same (*Marston* vs. Weston, supra), or that due to the delay, the petitioner may cause the municipality financial loss by reason of the fact that his office has been filled by another party who is receiving salary for it, and that the municipality may be required to reimburse the wrongfully discharged party for services which he has never performed, and thereby cause serious financial difficulty to the municipality. (*Marston* vs. Weston, supra; and Kennedy vs. Weston, supra.)

These rules of law as announced by the above cases have little application to the question of law or lack of diligence in the prosecution of the suit in the instant case, as in all of them the petition was not filed

within the time prescribed by the law. In the instant case the original petition was filed within the six month period, and the reason assigned why it should be dismissed for laches is for want of diligent prosecution. There is authority for the proposition that the petition itself must be prosecuted diligently or it may be dismissed on motion of the respondents. (14 Corpus Juris Secundum, page 263.) This question has never been decided by our Supreme Court but has been mentioned by them in People vs. Burdette, supra, and Carroll vs. Houston, supra. The court uses the identical language in both opinions and in the Houston case, on page 537, the court says:

"The authorities seem to hold that the common law writ of certiorari may be quashed for failure to prosecute it with diligence even after the return is filed, citing cases."

These statements by the court are dicta as in neither one of them was it necessary to decide this question as the petitions themselves in each case had not been filed within the six month period. Even admitting that the above propositions of law are the law, it does not aid the appellees under the pleadings in this case. The question of laches or failure to prosecute diligently are affirmative defenses. The appellees have urged them in their motion to dismiss. The burden would be upon them to prove them. The original petition and the amended petition do disclose the dates upon which they were filed. As a matter of law it cannot be said that the fact that the various petitions were filed between 1940 and 1950 and no hearings were had upon them, would of itself constitute laches by lack of diligence in failure to prosecute the suit. The time element alone, which is all the guide we have in this petition, would not prove the defense of laches. There might be many reasons for the delay in the prosecution of the suit. Besides the petition in this case we have the answer of the petitioners to the motion to dismiss, which stands uncontroverted and admitted to be true. No motion was made to strike the same, and it stands as part of the

within the time prescribed by the law. In the instant case the original petition was filed within the six month period, and the reason assigned why it should be dismissed for lack of diligent prosecution. There is authority for the proposition that the petition itself must be prosecuted diligently or it may be dismissed on motion of the respondents. (11 Corpus Juris Secundum, page 263.) This question has never been decided by our Supreme Court but has been mentioned by them in People vs. Hardesty, supra, and Carroll vs. Houston, supra. The court uses the identical language in both opinions and in the Houston case, on page 531, the court says: "The authorities seem to hold that the common law writ of certiorari may be quashed for failure to prosecute it with diligence even after the return is filed, citing cases."

These statements by the court are made as in neither one of them was it necessary to decide this question as the petitioners themselves in each case had not been filed within the six month period. Even admitting that the above propositions of law are the law, it does not aid the appellees under the pleadings in this case. The question of lack of diligence to prosecute diligently are affirmative defenses. The appellees have urged them in their motion to dismiss. The burden would be upon them to prove that. The original petition and the amended petition do disclose the dates upon which they were filed. As a matter of law it cannot be said that the fact that the various petitions were filed between 1940 and 1950 and no hearings were had upon them, would of itself constitute lack of diligence in failure to prosecute the suit. The time element alone, which is all the guide we have in this petition, would not prove the defense of lack of diligence. There might be many reasons for the delay in the prosecution of the suit. Besides the petition in this case we have the answer of the petitioners to the motion to dismiss, which stands uncontroverted and admitted to be true. No motion was made to strike the same, and it stands as part of the

pleadings in this cause. This answer, giving it full weight as it is entitled to be given, sets up various reasons why the hearing of the petitions was delayed. The answer discloses that the delay was caused in part at least by agreement with the respondents; that at all times the parties were attempting to settle the cause of action; and that the petitioner never intended to abandon his suit. While it is true it was the duty of the petitioner to prosecute his original suit with diligence, the delay is excusable when it was induced by the adverse party. It cannot be taken advantage of by him when he has in part at least contributed to it. (21 Corpus Juris 243.)

While it is debatable whether it is as much the duty of the plaintiff to prosecute his suit as it is the defendant to obtain a ruling on a motion to dismiss, under the allegations of the petition and the answer, it is apparent that the delay was occasioned by all the parties to the suit. If appellees desired to have the suit heard, they should have done what was required of them toward that end. (Epley vs. Epley, 328 Ill. 582; Leonard vs Garland, 252 Ill. 300.)

The question of what may constitute laches by failing to prosecute a lawsuit with diligence depends upon the facts of each particular case. This court, in Svela vs. Bloc^h, 294 Ill. App. 515, on page 520, in discussing this question says, after reviewing certain cases:

"It is the duty of a complainant to prosecute his suit with diligence and if there is unreasonable delay his bill ought to be dismissed, but the purpose of courts and of the law is to accomplish justice, and to give every litigant an opportunity to present his cause if he has not been guilty of such negligence as to forfeit his right."

Appellees contend that since the original petition and the first amended petition did not state a cause of action, there was no valid petition for a writ of certiorari filed until the second amended petition was filed, and

pleading in this cause. This answer, giving it full weight as it is entitled
to be given, sets up various reasons for the position of the petitioners
relayed. The answer declares that the delay is caused by the fact
by agreement with the respondents, that as all these the petitioners were
and to settle the cause of action, and that the petitioners were
to be given the full weight, which it is now it is the duty of the petitioners
to be given the full weight, which it is now it is the duty of the petitioners
was intended to be given the full weight. It is now it is the duty of the petitioners
when he has at least contributed to it. (21 January 1900.)

While it is inevitable whether it is in fact the duty of the petitioners
to prosecute the suit as it is the duty of the petitioners to obtain a ruling on a motion
to dismiss, under the provisions of the petition and the answer, it is
sufficient that the delay was caused by the fact that the petitioners
expressed their intention to have the suit heard, they should have been
required to do so. (21 January 1900.)

The petitioners of what was said in the answer to the petitioners
further with reference to the fact that the petitioners were
the answer, in which the petitioners were required to do so. (21 January 1900.)

It is the duty of the petitioners to prosecute the suit with diligence
and it is their responsibility to have the suit heard, but the
purpose of the suit is to have the suit heard, and to have every
effort to prosecute the suit as it is the duty of the petitioners to
and diligence as to obtain the result."

Affirmed without cost to either the original petitioners and the respondents
petitioners did not state a cause of action, they were to settle the suit for
with all questions filed with the court, and the petitioners were to settle the suit

this was filed too late. This contention is without merit. The Civil Practice Act (Ill. Rev. Stat. 1951, chap. 110, par. 125) applies to certiorari proceedings. Section 46 of the Practice Act (Ill. Rev. Stat. 1951, chap. 110, par. 170) provides in substance that amendments to pleadings shall not bar actions by limitation if the amended pleadings grow out of the same transaction and that such amendment shall be held to relate back to the date of the filing of the original pleading amended. The above mentioned provisions of the Practice Act require us to hold that this contention of the appellees is untenable. X

In our opinion the second amended petition considered with the answer stated a cause of action, and the trial court was unwarranted in dismissing it. The question of whether or not the evidence on a hearing would show that the petitioner was guilty of laches in not vigilantly prosecuting his suit is a question to be determined from such evidence, but cannot be determined from the pleadings here. }

The orders and judgments of the trial court dismissing the petitions were erroneous and without foundation in law, and the said judgments and orders are reversed and the cause remanded to proceed in such manner not inconsistent with the opinion of this court.

Cause reversed and remanded with directions.

X
This was filed too late. This contention is without merit. The Civil
Practice Act (TIL. Rev. Stat. 1927, Chap. 110, Part 1A) applies in enforcement
proceedings. Section 14 of the Practice Act (TIL. Rev. Stat. 1927, Chap. 110,

Part 1A) provides in substance that amendments to pleadings shall not be
allowed by limitation if the amendment is made after the trial has begun
and that such amendment shall be held to relate back to the date of the
filing of the original pleading. The above contention is without merit.

of the Practice Act require it to hold that the contention of the petitioners
is untenable.

In my opinion the second amended petition submitted with the motion
states a cause of action, and the first amended petition submitted in January
is. The question of whether or not the petitioners in a hearing would show
that the petitioners was guilty of fraud is not a triable issue. This
is a question to be determined from such evidence, but cannot be deter-
mined from the pleadings here.

The orders and judgments of the trial court granting the petitions
were erroneous and without foundation in law, and the said judgments and
orders are reversed and the cause remanded to proceed in such manner not
inconsistent with the opinion of this court.

Causes reversed and remanded with directions.

5K
amf

2603

A

Abstract

Gen. No. 10546

Agenda No. 18

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1951

345 I.A. 479²

PEOPLE OF THE STATE OF ILLINOIS,)	
Defendant in Error,	)	Writ of Error to the
)	
vs.	)	County Court of
)	
FRANK ALLEN,	)	Winnebago County
Plaintiff in Error.))	

ANDERSON -- J.

This case comes to this court on appeal from the County Court of Winnebago County. We are of the opinion that the proper method of review herein is by writ of error and that appeal has been improvidently employed. However, no objections have been raised by opposing party or by counsel to the bringing of the case here on appeal. The issues in the case sufficiently appear upon the record before this court. Therefore, under rule 28 of the Supreme Court of Illinois (Ill. Rev. Stat. 1951, chap. 110, par. 259.28), this case will be considered as if the proper method of review had been employed. ✓

The plaintiff in error, Frank Allen, based on an information filed by the State's Attorney and a plea of not guilty, was found guilty by a verdict of a jury of violating Ill. Rev. Stat. 1949, chap. 38, par. 439. This statute provides a penalty against any person who shall intentionally damage the motor vehicle of another without the permission of the owner. The jury imposed a fine of \$200.00 and further fixed Allen's punishment at 183 days confinement in the county jail. At close of the People's case the defendant filed his written motion with appropriate instruction attached, asking the court to instruct the jury to find the issues for the defendant. This motion and instruction was refused. Motions to set aside the verdict and for a new trial were filed, argued, and denied by the trial judge, who then imposed sentence in conformity with the verdict of the jury and the plaintiff in error, hereinafter referred to as the defendant, appealed. The errors which the defendant assigned to obtain a reversal of the judgment are as ✓

follows: the information is fatally defective and void; the evidence did not prove the defendant guilty beyond a reasonable doubt; and the court erred in granting certain instructions tendered to the court by the people.

The information on which this Criminal Prosecution is based alleges:

"..... that one Frank Allen late of said County of Winnebago and State of Illinois, on the 17th day of November, in the year of our Lord one thousand nine hundred and fifty, at and within the said County of Winnebago, in the State of Illinois, aforesaid, unlawfully and wilfully, intentionally and without authority from the owner did damage the accessories, equipment, appurtenances and attachments, to wit, the window glass of a certain motor vehicle to wit 1940 Packard without permission of the owner thereof contrary to the form of the statute in such case made and provided and against the peace and dignity of the same people of the State of Illinois."

No motion to quash the information was made by the defendant prior to trial. The defendant did not allege or claim, in his motion to set aside the verdict and for a new trial, that the information was void.

The criminal statute on which the information is based, Ill. Rev. Stats., 1949, chap. 38, par. 439, supra, provides in part: "..... to intentionally cut, mark, scratch or damage the chassis, running gear, body, sides, top, covering or upholstering of any motor vehicle, the property of another, or to intentionally cut, mash, mark, destroy or damage such motor vehicle, or any of the accessories, equipment, appurtenances or attachments thereof, or any spare or extra parts thereon being or thereto attached, without the permission of the owner thereof"

The same statute further provides: ".....Any person who shall violate any of the provisions of this act shall, upon conviction thereof, be confined in the county jail, or sentenced to labor in the workhouse of the county, city or town where the conviction is had, or on the streets or alleys

of the city or on the public roads in the county, or to such labor under the direction of the sheriff, as the county board may provide for, not exceeding one (1) year, or fined not exceeding two hundred (\$200) dollars, or both."

Defendant's first contends that the fact that the information fails to state the name of the owner of the Packard automobile makes the information wholly void and therefore the judgment of conviction obtained under this alleged void information was error. It is well settled law in this state that if the indictment or information is void, advantage of this may be taken by the defendant at any stage of the proceedings. The law on this subject is stated in *People vs. Green*, 368 Ill. 242, page 250: "It is a rule, even in civil pleading, that if a complaint fails to state a cause of action the defect may be reached and the question raised on writ of error, even if there has never been any demurrer, motion for a new trial or motion in arrest of judgment. (*Oulvey vs. Converse*, 326 Ill. 226; *Chicago and Eastern Illinois Railroad Co. vs. Hines*, 132 id. 161.) The same rule applies to criminal pleading, and if an indictment is void the error may be reached in this court even though there has been a plea of guilty in the trial court. (*Klawanski vs. People*, 218 Ill. 481.) In such case it is error to overrule a motion in arrest of judgment and, on review, the proper order is one of reversal without remanding. (*People vs. Martin*, 314 Ill. 110; *People vs. Barnes*, id. 140.) In the case of *People vs. Minto*, 318 Ill. 293, which was decided shortly after the *Barnes* case, *supra*, it appears that the question of the sufficiency of the information was not raised in the Appellate Court nor in this court until the filing of a reply brief pointing out that, under the *Barnes* case, the information was insufficient. We there held that the judgment would be reversed even though the matter had never been called to the attention of this court until the filing of the reply brief. In the later case of *People vs. Wallace*, 316 Ill. 120, the indictment was insufficient and it was again held that the point was good, even though raised for the first time in the reply brief"

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The second part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The third part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The fourth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The fifth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The sixth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The seventh part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The eighth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The ninth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The tenth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one.

If the indictment or information is wholly void, no motion to quash the indictment or information is necessary. (Klawanski vs. People, 218 Ill. 481; People vs. Novotny, 371 Ill. 58.) If the indictment or information is defective but not void, then the defendant can only take advantage of the same by motion to quash, made in apt time prior to the trial, and it cannot be raised after verdict. (People vs. Novotny, supra; People vs. Stills, 302 Ill. App. 302.) In People vs. O'Brien, 404 Ill. 236, the defendant was charged with malicious mischief in that he injured and defaced a certain dwelling house owned and in the possession and control of Charles Stransky. The Supreme Court reversed the case on the ground that the people had not sustained the burden of proving the ownership of the premises. The court says on page 238 of the opinion: "An indictment for offenses against persons or property must allege and prove the name of the person or property injured, if known. This is to enable the defendant to plead either former conviction or acquittal in case of a second prosecution for the same offense. (People vs. Flaherty, 396 Ill. 304.) The statute requires that, in order to constitute the crime of malicious mischief, the building defaced, or chattels destroyed, must be those of another. (Ill. Rev. Stat. 1947, chap. 38, par. 425; People vs. Sturch, 389 Ill. 82.) Where the offense is against property, the indictment must allege, and the People must show, that the property injured was that of a person other than the accused. (People vs. Burnett, 394 Ill. 420.) The allegation of ownership of property defaced or injured was a material averment. It raised a question of fact which the People were bound to prove."

There are no cases in the reviewing courts of Illinois involving the sufficiency of an information based on the statute here in question. There are several cases hereinafter mentioned involving the construction of an analagous statute making it a misdemeanor to drive or operate the motor vehicle of another person without the owner's consent (Ill. Rev. Stat. 1949, chap. 95¹/₂, par. 39a).

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and settlement, followed by a period of rapid expansion and industrialization. The American Revolution was a pivotal moment in the nation's history, leading to the establishment of a new government and the declaration of independence. The 19th century was a time of great achievement, with the nation expanding its territory and becoming a world power. The 20th century brought new challenges, including the Civil War, the Great Depression, and the rise of the atomic age. Today, the United States continues to grow and change, facing new challenges and opportunities in the 21st century.

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and settlement, followed by a period of rapid expansion and industrialization. The American Revolution was a pivotal moment in the nation's history, leading to the establishment of a new government and the declaration of independence. The 19th century was a time of great achievement, with the nation expanding its territory and becoming a world power. The 20th century brought new challenges, including the Civil War, the Great Depression, and the rise of the atomic age. Today, the United States continues to grow and change, facing new challenges and opportunities in the 21st century.

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and settlement, followed by a period of rapid expansion and industrialization. The American Revolution was a pivotal moment in the nation's history, leading to the establishment of a new government and the declaration of independence. The 19th century was a time of great achievement, with the nation expanding its territory and becoming a world power. The 20th century brought new challenges, including the Civil War, the Great Depression, and the rise of the atomic age. Today, the United States continues to grow and change, facing new challenges and opportunities in the 21st century.

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and settlement, followed by a period of rapid expansion and industrialization. The American Revolution was a pivotal moment in the nation's history, leading to the establishment of a new government and the declaration of independence. The 19th century was a time of great achievement, with the nation expanding its territory and becoming a world power. The 20th century brought new challenges, including the Civil War, the Great Depression, and the rise of the atomic age. Today, the United States continues to grow and change, facing new challenges and opportunities in the 21st century.

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and settlement, followed by a period of rapid expansion and industrialization. The American Revolution was a pivotal moment in the nation's history, leading to the establishment of a new government and the declaration of independence. The 19th century was a time of great achievement, with the nation expanding its territory and becoming a world power. The 20th century brought new challenges, including the Civil War, the Great Depression, and the rise of the atomic age. Today, the United States continues to grow and change, facing new challenges and opportunities in the 21st century.

In People vs. Kasker, 209 Ill. App. 597, an abstract opinion, it was held that an information based on this statute, alleging that the defendant drove the automobile of another person without the owner's consent but which failed to state the name of the owner, was void. The reason for this is that the lack of the name, the owner injured by the crime, would prevent the defendant, if later charged with the commission of this crime, from pleading a former conviction or acquittal. For this reason the information which failed to state the name of the owner was void and that the defendant may raise this question on writ of error even though the record does not show it was raised in the trial court.

The People vs. Tony Blue, 222 Ill. App. 255, involved an information against the defendant for driving an automobile without the owner's consent. The information stated that the automobile was taken and used without the consent of the owner, the name of the owner not being named. The Appellate Court held that this rendered the information void, citing People vs. Kasker, 209 Ill. App. 597, supra, and reversed the cause without remanding.

Applying the above announced rules of law to this case, it appears to us that the offense charged in the information in question clearly was an offense against the property of another, and that it is indispensable that the information state the name of the person who owned the Packard automobile in question. If the defendant were subsequently charged by indictment or information for the commission of the same offense, the record here as disclosed by the information would not be sufficient to identify the crime so that his plea of former conviction would bar the subsequent prosecution. (People vs. O'Brien, supra.) So far as this information discloses, the Packard automobile might have been ~~his own~~ automobile. The information should have contained the name of the person whose property was injured, and lack of these facts in the information renders the information void. (People vs. Flaherty, 396 Ill. 304.)

Counsel for the People contends that the case of People vs. Novotny, supra, is in point. An examination of this case discloses that the question involved there was whether the name of the prosecutor in an action for malicious mischief should be endorsed on the indictment, and what proof of this was necessary. The court held that the indictment was not void, because the witnesses named were not the owners of the property. We do not think this case is in point. The case of People vs. Stanton, 289 Ill. App. 616, cited by Counsel for the People, is printed in abstract form, but a copy of the entire opinion is attached to his brief. It is a case wherein the defendant is charged with violating another portion of the statute involved here. The information charged that the defendant started a motor vehicle by shifting its gears, describing the vehicle, without the authority from the owner. This information failed to name the owner, and the Appellate Court held the information good. The legal questions discussed here were not discussed in this opinion, and we do not believe that it should be followed in this case.

For the reasons above assigned, it is our opinion that the information is void. The law requires a valid information or indictment against one charged with crime. Such does not appear from the record in these proceedings.

As no conviction obtained could be sustained under this void information, the judgment should be and is reversed without remanding.

Reversed,

OK
2/25

2613

A

Gen. No. 10553

Agenda No. 33

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1951

345 I.A. 480

RALPH MCCLURE,)	
Plaintiff-Appellant,	)	Appeal from
vs.)	
	)	Circuit Court,
GEORGE HONDROS,)	
Defendant-Appellee.	)	Winnebago County, Illinois

ANDERSON -- J.

This case arises from an appeal from the Circuit Court of Winnebago County, Illinois. Ralph McClure, plaintiff-appellant, hereinafter referred to as the mortgagor, filed his suit against George Hondros, defendant-appellee, hereinafter referred to as the mortgagee, to recover damages under the penalty clause of Ill. Rev. Stat. 1949, chap. 95, par. 27. The Statute provides in substance that in all sales of personal property under the power of sale contained in any chattel mortgage, the mortgagee is required, upon consummating said sale, to make out a statement showing the items of personal property sold, the name of each purchaser, and the amount for which each article was sold; also an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling the said property. This report must be mailed or delivered to the mortgagor within ten days from the date of the sale. The Statute further provides that if the mortgagee has not complied with the statutory requirements, the mortgagor may sue and

Gen. 10:23

REPORT OF THE TALLI

תשס"ח

THE JOURNAL OF THE

... 1925

[illegible]

reccver from the mortgagee one-third of the value of the property so sold.

The complaint alleged that the mortgagee sold the chattel mortgaged property for \$3000.00, which is admitted to have been a fair price for the same, and the mortgagor in his complaint against the mortgagee asked for recovery in the sum of \$1000.00. The mortgagee filed a general denial to the complaint and a counterclaim for deficiency judgment on the note and mortgage, with interest from the date of sale.

The trial court found that the mortgagor was not entitled to recover the statutory penalty and dismissed the complaint of the mortgagee^{or}. It also found that the mortgagor was still indebted to the mortgagee on the note and mortgage in the sum of \$747.39, and entered a judgment for that sum in favor of the mortgagee, George Hondros, and against the mortgagor, Ralph McClure, on the counterclaim.

It appears from the record that prior to the time of the mortgage sale in question, the plaintiff, Ralph McClure, the mortgagor, was iniebted to George Hondros, the defendant mortgagee, in the sum of \$5000.00. To secure the indebtedness, McClure executed his promissory note for the said amount secured by a chattel mortgage consisting of many items, some of them being large items such as a carbonic soda fountain, and some of them small items such as two ice cream dippers. The property was all located on the premises known as the Ice Cream Pallace in Rockford, Illinois, the location being designated in the chattel mortgage. The mortgagor defaulted in payments required in the note and mortgage, and the chattel property was taken over by the mortgagee under the provisions in the mortgage. A public sale was held of the same, and a written report of the sale was given to the mortgagor. The report of sale designated the date of the sale and a list of the various items sold, itemizing them both large and small, from a liquid carbonic soda fountain to two ice cream dippers. The report of sale

[illegible]

stated that all of the items were purchased by Sam Castelese for the sum of \$3000.00.

The mortgagor admits that the property brought a fair price, and the only complaint he has with the report of sale is that it did not list the purchaser of each article. For that reason alone he urges that he is entitled to collect the statutory penalty above mentioned.

The uncontroverted evidence in the record discloses that at the sale there were no bidders for each separate item; so the property was offered in bulk, and was all bid in by Sam Castelese as above mentioned. The mortgagee^{or} cites as authority the cases of Robley vs. Culwell, 69 Ill. App. 272; Marvel vs. McKinsey, 105 Ill. App. 164; Watson vs. Makaroff, 167 Ill. App. 428; Askad vs. Packard Motor Car Company of Chicago, 195 Ill. App. 251; and Penilton vs. Petchart et al, 210 Ill. App. 313.

An examination of all of these cases discloses that the report of sale required to be given under the above mentioned statute did not include the names of the purchasers. Thus these cases were not in substantial compliance with the statute, and the statutory penalties were exacted from the mortgagees.

These cases are not parallel nor are they authority in the instant case, since in the instant case the name of the purchaser is disclosed, and as there were no purchasers for the items offered separately, there is nothing the mortgagee could report about them. In our opinion the statute does not require the mortgagee to state in his report of sale that there were no bids for each separate item. In our opinion the mortgagee fully complied with the provisions of the above statute as to his report to the mortgagor of the sale, and the trial court was correct in dismissing the mortgagor's complaint. We believe the above conclusion follows regardless of the well-known rule of law that penal statutes are to be construed strictly.

It is the duty of the court to see that the law is properly administered, and that the rights of the parties are protected.

The court is of the opinion that the law is properly administered, and that the rights of the parties are protected. It is the duty of the court to see that the law is properly administered, and that the rights of the parties are protected.

The court is of the opinion that the law is properly administered, and that the rights of the parties are protected. It is the duty of the court to see that the law is properly administered, and that the rights of the parties are protected.

The court is of the opinion that the law is properly administered, and that the rights of the parties are protected. It is the duty of the court to see that the law is properly administered, and that the rights of the parties are protected.

The court is of the opinion that the law is properly administered, and that the rights of the parties are protected. It is the duty of the court to see that the law is properly administered, and that the rights of the parties are protected.

It is a well-known rule of law that a chattel mortgage is security for a debt ordinarily evidenced by a promissory note, and the mortgagee, having properly credited on the note, the proceeds of the sale of the mortgaged property, is entitled to recover any existing balance on his note from the mortgagor. This balance is sought to be recovered in this case on the counterclaim. The mortgagee gave the mortgagor credit on his note for \$2990.00. This credit arose from the \$3000.00 received by the mortgagee from the sale of the chattel property less \$10.00 for expenses of the sale. After this credit the mortgagor still owed the mortgagee \$674.51. Interest accrued on this sum to the date of the trial for \$72.88, making the total sum due on the date of the trial \$747.39. The attorney's fees, claimed by the mortgagee in his report of sale and asked for in his counterclaim, were not allowed by the court.

The evidence is uncontroverted that George Hondros, defendant-appellee, was entitled to recover on his counterclaim against Ralph McClure, the sum of \$747.39. We find no error in this record and the judgment of the trial court is affirmed.

Judgment affirmed,

It is a well-known rule of law that a chattel mortgage is security for a debt ordinarily evidenced by a promissory note, and the mortgagee, having properly retained on the date, the proceeds of the sale of the mortgaged property, is entitled to recover any existing balance on his note from the mortgageor. This balance is said to be retained in this case on the court's file. The mortgage was the mortgagee's credit on the note for \$2000.00. This credit arose from the \$2000.00 received by the mortgagee from the sale of the mortgaged property less \$150.00 for expenses of the sale. After this credit the mortgageor still owes the mortgagee \$1850.00. Interest accrued on this sum to the date of the trial for \$77.28, making the total sum due on the date of the trial \$1927.28. The attorney's fees, claimed by the mortgagee in his report of sale and asked for in his computation, were not allowed by the court.

The witness is represented that George T. Parker, defendant, appeared, and testified to recover on his promissory note against John H. Jones, the sum of \$177.28. He did so when in this court and the judgment of the trial court is affirmed.

Respectfully submitted,

2437

From the pleadings and the testimony it appears that U.S. Highway 67 extends northerly and southerly at and near the south part of Jerseyville, Illinois; that Illinois Route 109 intersects said Route 67 somewhat north of the scene of the collision from the west and forms a T intersection; on the east side of Route 67 south of the intersection is a filling station and coal yard with a wide driveway and parking lot extending northerly about two hundred feet from the scene of the accident; no curbing separates this driveway and parking lot from the highway; from the said intersection southerly Route 67 curves slightly to the west; the accident occurred in the curve on the easterly side thereof near

STATE OF ILLINOIS

IN SENATE

COMMITTEE ON JUDICIARY

REPORT
JANUARY 1, 1931

SENATE NO. 3

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

SENATE NO. 3775

Plaintiff-appellee and defendant-appellee
collision between the automobile and that of defendant-appellee
Thomas Wood. Upon trial of the case without a jury the court
entered judgment in favor of plaintiff for \$2500.00 from which
judgment this appeal is taken.
From the pleadings and the testimony it appears that U.S.
highway 67 extends northerly and southerly to and near the south
part of Jerseyville, Illinois; that Illinois Route 109 intersects
said highway at a point north of the scene of the collision from
the west and forms a T intersection; on the east side of Route 109
south of the intersection is a filling station and coal yard with
a wide driveway and parking lot extending southerly about two
hundred feet from the scene of the accident; no crossing separates
this driveway and parking lot from the highway; from the east in-
tersection southerly Route 109 curves slightly to the west; the
accident occurred in the curve on the westerly side thereof near

such driveway about ten P.M. on a foggy night with visibility limited to ten or fifteen feet; defendant had parked his Chevrolet van-body milk truck on the easterly side of Route 67 facing south in the driveway either off or on the concrete directly back of a Dodge truck, also owned by him, and heading in the same direction; plaintiff, while driving southerly on Route 67, drove his Buick automobile into the rear end of the Chevrolet truck, resulting in his injuries. It is charged (1) that defendant parked his Chevrolet truck on the easterly side of said Route 67 so that the right wheels and part of said motor vehicle were upon said highway; (2) that the same had no lights; (3) that the truck was parked in front of a private driveway; that the same was parked along a left-hand curve where angle parking was prohibited.

The errors relied upon for reversal are substantially that plaintiff was guilty of contributory negligence, that defendant was not guilty of negligence, and that the judgment was contrary to the law and the evidence, and that the motions for directed verdict should have been allowed.

An analysis of the evidence is necessary to decide the questions presented. Plaintiff testified that he was going south on Route 67 about ten o'clock on a dark and foggy night with a visibility of ten to fifteen feet at a speed of about fifteen miles per hour; that in the curve in question he saw lightsof a vehicle approaching him from the south, which vehicle was in the center of the pavement; that when the on-coming car, travelling at a speed substantially greater than that of plaintiff's car, got within twenty or twenty-five feet of him he speeded his car up to twenty-five or thirty miles per

such driveway about 7 P.M. on a foggy night with visibility limited to ten or fifteen feet; defendant had parked his Chevrolet van-body with truck on the eastern side of Route 67 facing south in the driveway either all on one concrete directly back of a Dodge truck, also owned by him, and heading in the same direction; plainiff, while driving southerly on Route 67, drove his Buick automobile into the rear end of the Chevrolet truck, resulting in his injuries. It is charged (1) that defendant parked his Chevrolet truck on the eastern side of said Route 67 so that the right wheel and part of said motor vehicle were upon said highway; (2) that the same had no lights; (3) that the truck was parked in front of a private driveway; that the same was parked along a left-hand curve where angle parking was prohibited.

The expert relied upon for reversal are substantially that plainiff was guilty of contributory negligence, that defendant was not guilty of negligence, and that the judgment was contrary to the law and the evidence, and that the reasons for directed verdict should have been allowed.

An analysis of the evidence is necessary to decide the questions presented. Plainiff testified that he was going south on Route 67 about ten o'clock on a dark and foggy night with a visibility of ten to fifteen feet at a speed of about fifteen miles per hour; that in the curve in question he saw lighted a vehicle approaching him from the south, which vehicle was in the center of the pavement; that when the oncoming car, travelling at a speed substantially greater than that of plainiff's car, for within twenty or twenty-five feet of him he speeded his car up to twenty-five or thirty miles per

hour and turned left at a forty-five degree angle; that he turned his head to see the northbound vehicle, saw a blur five or six feet in front of him in a flash of a second and didn't know what he hit. He never saw the vehicle with which he collided. His testimony was that he knew he did not leave the pavement on the east because of the fact that a Buick has sensitive front springs and he could tell that it did not leave the pavement. The Buick was junked subsequently. A Jerseyville police officer, Mr. Dabbs, testified that between nine-thirty and ten P.M. he went to the scene of the accident and arrived before the plaintiff was removed from his car; that he saw no lights on the truck; the Buick was headed southeasterly and was driven under the right rear of the truck; the rear wheels of the Buick were on the pavement and its right front wheel was about at the curb or on it; another truck was ahead of the Chevrolet and off the slab a little more; the night was foggy so that at times one could not see any distance but sometimes one could see a few feet, and maybe one would run into a little clear spot; the Buick was under the rear end of the truck halfway from the radiator to the steering wheel and its windshield was broken. Except for medical testimony this was all of plaintiff's case and defendant moved for a directed verdict.

In the case of Elliott v. Elgin, J. & E. Ry. Co., 325 Ill.App., 161 (at 171) it is stated; "The parties are agreed that contributory negligence is a question for the jury, except when the evidence of its existence is so clear that no reasonable minds could come to a contrary conclusion. In passing on defendant's point we have in mind the oft repeated rule that when there is any evidence which, taken with its reasonable inferences in its aspect most favorable to the plaintiffs, tends to show the

hour and turned left at a forty-five degree angle; that he turned
ed his head to see the approaching vehicle, saw a blue five or
six feet in front of him in a flash of a second and didn't know
what he hit. He never saw the vehicle with which he collided.
His testimony was that he knew he did not leave the pavement on
the east because of the fact that a police man testified that
springs and he could tell that it did not leave the pavement.
The police was James Kennedy, a Louisville police officer.
Mr. Gable, testified that between nine-thirty and ten P.M. he
went to the scene of the accident and arrived before the plaintiff
was removed from his car; that he saw no lights on the truck; the
which was loaded with material and was driven under the right rear
of the truck; the rear wheels of the truck were on the pavement
and the right front wheel was about at the curb or on it; another
truck was ahead of the Chevrolet and off the side a little more;
the night was fairly so that at times one could not see any dis-
tance but sometimes one could see a few feet, and maybe one could
run into a little clear spot; the truck was under the rear end
of the truck halfway from the rear to the steering wheel and
its windshield was broken. Except for medical testimony this
was all of plaintiff's case and defendant moved for a directed
verdict.

In the case of Willott v. State, 171 Ky. 201, 122

Ill. App., 101 (at 17) it is stated: "The parties are agreed
that contributory negligence is a question for the jury, except
when the evidence of its existence is so clear that no reasonable
juror could come to a contrary conclusion. In passing on defen-
dant's point we have in mind the oft repeated rule that when
there is any evidence which, taken with the reasonable inferences
in its respect most favorable to the plaintiff, tends to show the

use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law." In the instant case it appears that plaintiff did not know where defendant's truck was parked with reference to the concrete nor whether it had lights or not; that he travelled at a speed of from twenty-five to thirty miles per hour when the visibility was only ten or fifteen feet; he looked to his right to watch the passing northbound car instead of ahead; he failed to apply his brakes; he saw a blur five or six feet ahead of him before the crash; he did not know with what object he collided; his car was subsequently junked. His statement that he accelerated from fifteen to twenty-five or thirty miles per hour to successfully avoid an on-coming car travelling substantially in excess of his fifteen mile per hour speed, when it was twenty-five to thirty feet from him, borders on the incredible. As a matter of law, he was not in the exercise of due care and it was error not to allow the motion for a directed verdict.

Regardless of this the Court will examine the further testimony adduced on behalf of the defendant. Police officer Blackorby testified that he went to the scene of the accident with plaintiff's witness, Officer Dabbs; the visibility was about twenty feet; the two trucks were off of the highway and parked parallel to the slab; the right front and rear of the Buick were on the concrete but headed at an angle southeasterly diagonally and not parallel to the highway; the steering wheel of the Buick was broken and plaintiff was pinned between the brake pedal and the accelerator; he did not notice if there were lights on the truck. The witness Parsell stated that he lived south of Jerseyville and was driving his car home on the night in question; in order to obtain a visibility of ten or fifteen

use of the car, the question of the care is not for the jury. Whether there is any such evidence is a question of law. In the instant case it appears that plaintiff did not know where defendant's truck was parked with reference to the concrete apron whether it had lanes or not; that he travelled at a speed of from twenty-five to thirty miles per hour when the visibility was only ten or fifteen feet; he looked to his right as when the passing neighborhood car instead of ahead; he failed to apply his brakes; he saw a blue five or six foot ahead of him before the crash; he did not know what object he collided; his car was subsequently jammed. His statement that he accelerated from fifteen to twenty-five or thirty miles per hour is not only avoid an on-coming car travelling in the opposite direction of his fifteen mile per hour speed, when it was twenty-five to thirty feet from him, located on the shoulder, as a matter of law, he was not in the exercise of due care and it was error not to allow the motion for a directed verdict.

Regardless of this the Court will examine the further testimony adduced on behalf of the defendant. Police Officer Blackberry testified that he went to the scene of the accident with plaintiff's witness, Officer Babos; the visibility was about twenty feet; the two trucks were out of the highway and parked parallel to the curb; the right front end of the Buick was on the concrete and headed in an easterly direction; the Buick was not parallel to the highway; the steering wheel of the Buick was broken and plaintiff was placed between the brake pedal and the accelerator; he did not notice if there were lights on the truck. The witness Farwell stated that he lived south of Jerseyville and was driving his car home on the night in question; in order to obtain a visibility of ten or fifteen

feet it was necessary for him to put his head out of the window; the front of the Buick up to the windshield was under the truck; plaintiff had not been removed from the Buick; the rear right wheel of the truck was two feet from the pavement; the witness had first proceeded south past the scene, turned around and came back north; while going north he passed the Buick without having to cross west of the center line of the pavement; the rear lights of the truck were lighted as he passed it southerly but were off as he returned northerly; he was there before the police officers. Mrs. Parsell, the wife of the former witness stated that she was riding in the front seat of her husband's car; it was foggy and their speed was ten to fifteen miles per hour; it took about an hour to get plaintiff out of his car into an ambulance; both trucks were off of the highway; the northerly one a foot and a half or two feet. The defendant testified that he drove his Chevrolet truck southerly on the east side of the highway, at about eight-thirty P.M.; there was no curb on the east edge of the concrete; he parked his truck to the rear of his Dodge truck; walked along the east side of both trucks without the necessity of going on the concrete and looked at the right front spring of the Dodge truck; visibility was about ten feet; he parked about six to ten feet in the rear of the Dodge truck; he left the body lights and cab lights burning; it was in low gear; after the collision the Dodge truck, weighing about 10,500 pounds had been moved forward about four to five feet and the Chevrolet truck was about six feet easterly from the edge of the concrete.

From an examination of all the evidence it appears that plaintiff has failed, as a matter of fact and law, to prove both that he was in the exercise of due care and that defendant was

foot it was necessary for him to put his head out of the window; the front of the Buick up to the windshield was under the truck; plaintiff had not been removed from the truck; the rear right wheel of the truck was ten feet from the pavement; the witness had first proceeded south past the scene, turned around and came back north; while going north he passed the truck without seeing it cross west of the center line of the pavement; the rear light of the truck were lighted as he passed it suddenly they were off as he returned northward; he was there before the police officers; Mrs. Lavelle, the wife of the former witness stated that she was riding in the front seat of her husband's car; it was foggy and their speed was ten to fifteen miles per hour; it took about an hour to get plaintiff out of his car into an ambulance; when trucks were off of the highway; this testimony was a fact and a Chevrolet truck southerly on the east side of the highway, at about eight-thirty P.M.; there was no car on the east side of the highway; he parked his truck to the rear of his Dodge truck; he walked along the east side of both trucks without any necessity of going on the concrete and looked at the right front spring of the Dodge truck; plaintiff was about ten feet; he parked about six to ten feet in the rear of the Dodge truck; he left the body lighted and one light burning; it was in low gear; after the collision the Dodge truck, weighing about 10,500 pounds had moved forward a foot four to five feet and the Chevrolet truck was about six feet easterly from the edge of the concrete.

From an examination of all the evidence it appears that plaintiff has failed, as a matter of fact and law, to prove both that he was in the exercise of due care and that defendant was

negligent. While the judgment of the trial judge who had the opportunity of hearing and observing the witnesses should not be lightly disturbed, here it is the conclusion of the Court that his judgment was against the manifest weight of the evidence, by reason of which it should be reversed. (Decorators Supply Corp. v. Babka, 290, Ill.App.298; Sharkey v. Sisson, 310 Ill.98; Fowler v. Fowler, 315 Ill.App.,270).

The judgment of the trial court is reversed and the cause remanded for a new trial.

Reversed and remanded.

negligence. While the judgment of the trial judge was on the opportunity of hearing and observing the witness in person and the testimony given, there is no conclusion of the court that the judgment was against the medical weight of the evidence, by reason of which it should be reversed. (See People v. Jones, 100 Cal. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 9

45473

KUTTNER & KUTTNER, INC., a
corporation,
Appellee,

v.

CAREER STUDIOS, INC., a
corporation,
Defendant.

NATIONAL BOULEVARD BANK OF
CHICAGO, a national banking
association,
Garnishee,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

345 I.A. 504

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Defendant garnishee National Boulevard Bank of
Chicago appeals from a judgment of the Municipal Court of
Chicago entered against it in the sum of \$941.47.

Plaintiff is in the advertising business, and
between August 30, 1948, and December 30, 1948, rendered
services to the defendant Career Studios, Inc., which was
engaged in the business of training women to become pro-
fessional models. Thereafter in a suit to recover the
value of these allegedly unpaid services plaintiff re-
covered a judgment against Career Studios, Inc., in the
sum of \$1406.43 and costs. Thereafter, on September 18,
1950, it filed a garnishment action, which is the subject
of this appeal, against the bank, and joined therein as
additional garnishee defendant, Nina Morgan Career Studios,
Inc. The affidavit for garnishment filed September 18,
1950, against the defendant garnishees, after reciting the
existence of the judgment and the amount and the fact that

1904

1. The first part of the report is devoted to a general description of the work done during the year.

2. The second part contains a detailed account of the experiments conducted, and the results obtained.

3. The third part is devoted to a discussion of the results, and a comparison with the work of other investigators.

4. The fourth part contains a summary of the work, and a list of references.

5. The fifth part is devoted to a description of the apparatus used, and a list of the materials employed.

6. The sixth part contains a list of the names of the persons who assisted in the work.

7. The seventh part is devoted to a description of the work done during the year, and a list of the results obtained.

8. The eighth part contains a list of the names of the persons who assisted in the work.

9. The ninth part is devoted to a description of the work done during the year, and a list of the results obtained.

10. The tenth part contains a list of the names of the persons who assisted in the work.

11. The eleventh part is devoted to a description of the work done during the year, and a list of the results obtained.

12. The twelfth part contains a list of the names of the persons who assisted in the work.

13. The thirteenth part is devoted to a description of the work done during the year, and a list of the results obtained.

14. The fourteenth part contains a list of the names of the persons who assisted in the work.

15. The fifteenth part is devoted to a description of the work done during the year, and a list of the results obtained.

16. The sixteenth part contains a list of the names of the persons who assisted in the work.

17. The seventeenth part is devoted to a description of the work done during the year, and a list of the results obtained.

18. The eighteenth part contains a list of the names of the persons who assisted in the work.

19. The nineteenth part is devoted to a description of the work done during the year, and a list of the results obtained.

20. The twentieth part contains a list of the names of the persons who assisted in the work.

21. The twenty-first part is devoted to a description of the work done during the year, and a list of the results obtained.

22. The twenty-second part contains a list of the names of the persons who assisted in the work.

23. The twenty-third part is devoted to a description of the work done during the year, and a list of the results obtained.

24. The twenty-fourth part contains a list of the names of the persons who assisted in the work.

-2-

the defendant has no property liable to execution, further recites "that on or about May 12, 1950, defendant transferred substantially all of its property and assets and bank account in National Boulevard Bank of Chicago to Nina Morgan Career Studios, Inc., without compliance with the Bulk Sales Law of the State of Illinois; that said Nina Morgan Career Studios, Inc., has been and still does conduct business under the name and style of 'Career Studios, Inc.' at the same address; and that this affiant has just reason to believe that Nina Morgan Career Studios, Inc. and National Boulevard Bank of Chicago, a national banking association, * * * are indebted to said defendant and/or Nina Morgan Career Studios, Inc., or to have effects or estate of said defendant and/or Nina Morgan Career Studios, Inc. in possession, custody, or charge. Wherefore, this affiant prays that said Garnishee Defendants may be summoned as garnishees agreeably to law."

Interrogatories addressed to each of the garnishee defendants required them to answer as to whether or not they were indebted to "the above named defendant, Career Studios, Inc. and/or Nina Morgan Career Studios, Inc."

The bank answered each interrogatory as follows: "Answering as to Career Studios, Inc.--No," and made no answer as to whether or not it was indebted to Nina Morgan Career Studios, Inc. Nina Morgan Career Studios, Inc. filed its answer stating "No" to each interrogatory. The answers were contested by the plaintiff.

A trial was had upon the contest of the garnishees' answers on November 10, 1950, the only testimony being offered by either side was by the plaintiff who called William Shartle, vice president and treasurer and a director and stockholder of both corporations, and Sanford B. Frank, auditor of the bank. The facts adduced from this testimony, as well as other agreed matters, appear in the record as "Stipulation of Evidence." Upon the conclusion of the hearing, the court found the issues in favor of plaintiff and against the garnishee bank, and also made the following specific findings:

"* * * and does further find that the defendant, Career Studios, Inc. and the garnishee defendant, Nina Morgan Career Studios, Inc. are to all interests [sic] and purposes one and the same corporation, and further finds that Career Studios, Inc. heretofore in fraud of plaintiff's rights as a creditor, transferred and maintained a bank account in National Boulevard Bank of Chicago, garnishee defendant herein, in the name of Nina Morgan Career Studios, Inc. and that on the date of the service of garnishment summons herein on September 19, 1950 on said National Boulevard Bank of Chicago, garnishee defendant, there was on deposit in said bank in the name of Nina Morgan Career Studios, Inc. the sum of \$941.47, and the Court further finds that said credit of \$941.47, to the account of Nina Morgan Career Studios, Inc., was in fact and reality the credit of Career Studios, Inc., judgment debtor herein, and as such is subject to plaintiff's garnishment suit herein."

Defendant garnishee attacks this judgment order on three grounds: (1) that the garnishment affidavit is insufficient in law to support the judgment; (2) that there is no competent evidence that there was a fraudulent transfer, actual or constructive, of assets from the judgment debtor to Nina Morgan Career Studios, Inc.; (3) that there was no reason appearing from the evidence to justify

In 1911, the first year of the new Republic, the government
 of the United States, through the Department of State,
 issued a declaration of policy, known as the "Open Door
 Policy," which was intended to secure for the United States
 the right of free trade in China. This policy was based
 upon the principle that all nations should have equal
 access to the markets of China, and that no one nation
 should have a monopoly of trade with that country.
 The declaration was signed by Secretary of State
 William H. Taft, and it was a significant step
 towards the establishment of a new era of international
 relations. It was a declaration of the United States'

the court in disregarding the corporate entity of Nina Morgan Career Studios, Inc.

Plaintiff maintains that (1) the affidavit complied with the garnishment statute, and (2) the garnishment proceeding being based upon the theory that the bank account standing in the name of Nina Morgan Career Studios, Inc. was actually the bank account of Career Studios, Inc., the bank, having been put on notice of this contention, was obligated as a stakeholder to hold all funds in the name of Career Studios, Inc. or Nina Morgan Career Studios, Inc. until the trial court decided the issue.

We are of the opinion that the affidavit sufficiently complied with the statute (sec. 1 of the Garnishment Act, Ill. Rev. Stat. 1949, chap. 62, par. 1), inasmuch as it recited that the bank was indebted to the defendant and had effects or estate of the defendant in possession, custody or charge. It is true that the affidavit contained certain additional information, but, even though surplusage, was for the purpose of putting the bank on notice as to the particular nature of plaintiff's claim.

Defendant garnishee argues that plaintiff had no judgment against Nina Morgan Career Studios, Inc. and that, accordingly, unless the plaintiff could establish an exception to the general rule that a judgment creditor acquires no greater rights against a garnishee than his debtor has, he could not by garnishment process reach funds held by the bank and belonging to a person other than the judgment

[Faint, illegible handwritten text, likely bleed-through from the reverse side of the page.]

debtor. This argument begs the question because the principal issue here is whether or not the funds held by the bank did in truth and in fact belong to the judgment debtor or whether they belonged to some other bona fide entity. It is true that at the time of service of the garnishment summons the funds were carried in the name of Nina Morgan Career Studios, Inc., and that the judgment debtor was Career Studios, Inc. The affidavit, however, alleged the two entities to be one and the same, and this contention was made known to the bank in the garnishment proceedings in ample time to have held the funds awaiting the decision of the court on this disputed issue of fact.

In our view of this case we deem it unnecessary to decide whether or not the Bulk Sales Law is applicable to a transfer other than that of stock, merchandise, fixtures, or other goods and chattels.

Under its second point the defendant garnishee urges that there is no evidence whatsoever to support the court's finding that there was a fraudulent transfer of assets from the judgment debtor to Nina Morgan Career Studios, Inc. While it is true, as the defendant garnishee argues, that no physical act was shown whereby any formal transfer of assets was made from one corporation to another, we do not deem this to be controlling if in truth and in fact the two corporations were identical and the existence of one served only as a means of permitting

the other to defraud its creditors, as the court in its findings concluded. This court in McDermott v. A. B. C. Oil Burner Sales Corp., 266 Ill. App. 115, said at page 121:

"* * * However, the legal fiction of distinct corporate existence will be disregarded when necessary to circumvent fraud, or where the corporation is so organized and controlled, and its affairs so conducted as to make it merely an instrumentality of another corporation."

To determine whether or not the court was justified in concluding that there was a mere fictional barrier between these two corporations requires an analysis of the evidence.

Nina Morgan, after whom presumably the second corporation was named, is the wife of William Shartle. She is president of both corporations. William Shartle is vice president, treasurer and a director of both corporations. The officers and directors of the two corporations are the same. The address of both corporations is the same: 540 North Michigan avenue, Chicago, Illinois, and the business in which both engaged is identical. Career Studios, Inc. was organized in May of 1948, and in the fall of 1949 Nina Morgan Career Studios, Inc. was organized. At the time of the organization of the latter company the former was not dissolved, but from the date that Nina Morgan Career Studios, Inc. was organized with the same personnel, the same directors, the same location and performing identically the same business functions, the former company has been inactive. The sign on the doors of the main entrance to

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

-7-

the suite contained the words "Career Studios, Inc." A number of newspaper advertisements indicate that the business was designated both as "Nina Morgan Career Studios, Inc." and "Career Studios, Inc." In each instance in these advertisements where the designation "Nina Morgan Career Studios, Inc." appears, the words "Nina Morgan" are in small letters and "Career Studios" in large letters. In these display advertisements prospective customers are advised to send inquiries to "Career Studios, Inc., 540 North Michigan Avenue." It further appears that the telephone listing in the June 1950 Chicago alphabetical telephone directory was in the name of Career Studios, Inc., and that Nina Morgan Career Studios, Inc., was not listed in the Red Book (classified directory). When asked about the furniture and fixtures owned by Career Studios, Inc., the witness Shartle stated that the same had been mortgaged by Career Studios, Inc., to secure a finance company loan of \$1768.58 and that the finance company thereafter at a foreclosure sale sold the furniture and fixtures to Nina Morgan Career Studios, Inc., for the sum of \$800. Quoting from the "Stipulation of Evidence": "Mr. Shartle admitted that the closing of the Career Studios' bank account and the foreclosure sale all took place a very short time after plaintiff's instant suit was filed against Career Studios, Inc."

We cannot say from a review of all the evidence and competent inferences to be drawn therefrom that the trial

-8-

court's findings that these two corporations were "to all interests and purposes one and the same corporation" and that the "credit of \$941.47 to the account of Nina Morgan Career Studios, Inc., was in fact and reality the credit of Career Studios, Inc., judgment debtor herein" were against the manifest weight. In the case of Kovich v. Live Stock National Bank of Chicago, 320 Ill. App. 535, this court said at page 537:

"Appellant also maintains that 'where the legal title to money on deposit in a bank is in one name it cannot be garnisheed by the judgment creditor of another.' We reject this contention. The judgment creditor in a garnishment proceeding may prove that a bank credit listed in one name is in reality the credit of the judgment debtor. Garnishment as a remedy is administered upon equitable principles. A bare legal title is no shield against garnishment process."

Considerable reliance is placed by defendant garnishee on the case of Rothenberg v. Radtke Bros., Inc., 310 Ill. App. 538, also decided by this court. There the trial court was of the opinion that the evidence, distinguishable in many respects from that here reviewed, showed that the transactions involved were between two separate and distinct entities and this court was unwilling to say that the finding was against the manifest weight of the evidence. In the instant case the trial court found, upon evidence which we find sufficient to justify its conclusion, that the two corporations were one and the same.

Accordingly, the judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Schwartz and Robson, JJ., concur.

12

The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied. This condition is also necessary for the existence of solutions of the system (1) for arbitrary values of the parameters α and β . The second part of the paper is devoted to a detailed study of the properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β are unique and depend continuously on the parameters α and β . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β have the asymptotic properties of the solutions of the system (1) for arbitrary values of the parameters α and β . The fourth part of the paper is devoted to a study of the stability properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β are stable and depend continuously on the parameters α and β . The fifth part of the paper is devoted to a study of the properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β are unique and depend continuously on the parameters α and β . The sixth part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β have the asymptotic properties of the solutions of the system (1) for arbitrary values of the parameters α and β . The seventh part of the paper is devoted to a study of the stability properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β are stable and depend continuously on the parameters α and β . The eighth part of the paper is devoted to a study of the properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β are unique and depend continuously on the parameters α and β . The ninth part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β have the asymptotic properties of the solutions of the system (1) for arbitrary values of the parameters α and β . The tenth part of the paper is devoted to a study of the stability properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) for arbitrary values of the parameters α and β are stable and depend continuously on the parameters α and β .

45492

CLARA HANDTE GODBERSEN,)
Appellant,)
v.)
DOROTHEA HANDTE,)
Appellee.)

345 I.A. 505

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff appeals from a judgment order of the
Superior Court of Cook County entered November 13, 1950,
sustaining defendant's motion to strike plaintiff's
amended complaint and dismissing her suit, and from a
further judgment order of the Superior Court of Cook
County entered April 17, 1951, dismissing plaintiff's
appeal upon the ground that the notice of appeal was not
filed in apt time. Inasmuch as we have decided to review
this cause upon the merits it is deemed unnecessary to
discuss the respective contentions raised on the motion
to dismiss the appeal.

The pleadings in the case consist of a complaint,
a motion to strike the complaint supported by affidavit,
an amended complaint, and a motion to strike, also
supported by affidavit. The amended complaint alleges
that in November of 1936 John Handte died leaving him
surviving as his heirs at law the plaintiff, Clara Handte,
who has since married, and four other children, and that
upon his death the five children became possessed each
of a one-fifth interest in a farm which he owned in the
State of North Dakota; that on September 28, 1940, the
plaintiff and the defendant entered into an oral agreement

whereby the plaintiff promised to execute a quitclaim deed of her interest in the property to the defendant and the defendant promised that when the property was sold she would reimburse the plaintiff fully for plaintiff's one-fifth interest in said real estate and that at that time would also pay to the plaintiff one-fifth of the rents and profits which she had derived from the property from the date of the agreement to the date of the sale, whereupon plaintiff executed a quitclaim deed to the defendant; that thereafter, on or about July 6, 1947, the property was sold for \$10,000 and the rents and profits during the intervening seven years amounted to approximately \$33,000; that, based upon the oral promise of September 28, 1940, the plaintiff on July 6, 1947, became entitled to the sum of \$8,600, being one-fifth of the proceeds of the sale plus one-fifth of the rents and profits. Plaintiff prayed judgment against the defendant for that sum.

The sworn motion to strike sets out several grounds, only one of which we deem necessary to consider, namely, the validity of a release. It appears that on September 27, 1940, in consideration of the payment by the defendant to the plaintiff of \$100 and in further consideration of the defendant satisfying a certain judgment which she then held against the plaintiff and her husband in the Municipal Court of Chicago for the sum of \$360 and costs, plaintiff agreed to convey her interest in the North Dakota farm to defendant and two other sisters; that such deed was executed (being exhibited as part of the pleading). It

-3-

further appears from the affidavit that on the 27th of September, three days before the deed was delivered, and as part of the same transaction, plaintiff executed a release whereby she "released Dorothea Handte, the defendant herein, from all claims of every kind and character" which the plaintiff had against the defendant. Upon the reverse side of the \$100 check, which was part of the consideration for the quitclaim deed, the following endorsement appears: "In Full Handte-Godbersen conveyance and claims." (Italics ours.) It further appears the quitclaim deed and the check were simultaneously delivered.

Plaintiff admits the execution of the release and endorsement on the check, but insists that the release dated September 27, 1940 affects only those claims and undertakings which were due and owing at the time the release was executed, and that inasmuch as the pleaded agreement alleges that plaintiff's one-fifth share of the proceeds of the sale of the real estate and the intervening accrued profits would not be due until the real estate was sold, the release does not appertain to this sale. Plaintiff cites the case of Keeran v. The Wahl Co., 320 Ill. App. 457, where it was held substantially that a release must be so construed as to carry out the intention of the parties, and that the intention was to be sought in the instrument itself rather than in the light of the circumstances which surround the transaction. We recognize this as a salutary rule of law, and, applying it

100

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the building, my hands tucked into my pockets. The air was thick with the scent of old stone and the distant hum of city traffic. I had heard that the place was haunted, but I didn't believe it until now. The building was a grand, multi-story structure with arched windows and a prominent entrance. As I approached, I noticed a sign above the door that read "The Old House". I pushed the door open and stepped inside. The interior was dimly lit, with light streaming in from a large window at the end of the hall. The walls were covered in tapestries and the floor was made of polished wood. I walked down the hall, my footsteps echoing. At the end of the hall, I found a large, ornate fireplace. The fire was crackling, and the warmth of it drew me closer. I sat on the mantel, looking out the window. The view was of a quiet street with a few parked cars. I felt a sense of peace and comfort that I had never experienced before. I stayed there for a while, watching the fire and thinking about the future. The cold outside seemed to fade away, replaced by the warmth of the fire and the peace of the moment.

to the situation before us, are of the opinion that it sustains defendant's rather than plaintiff's contention. In September of 1940 defendant here held an unsatisfied judgment against the plaintiff. Plaintiff, at that time, had an interest, the value of which was then undetermined, in a farm in North Dakota. It is not disputed that the parties were desirous of satisfying this judgment and that plaintiff's interest in the North Dakota farm was to be used for this purpose. Apparently it was considered that the value of plaintiff's interest in the real estate amounted to more than the amount of the judgment, so defendant agreed to pay an additional \$100. The release and the endorsement on the check, which specifically refers to the "Handte-Godbersen conveyance and claims," were then executed and delivered. No other conveyance could have been involved other than the quitclaim deed which, as part of this same transaction, had been executed by the plaintiff to defendant and her two sisters. It is true that the farm was eventually sold for a price far in excess of the amount of the satisfied judgment and additional \$100. Even though, in light of subsequent events, plaintiff made a bad bargain, courts are bound by agreements of the parties voluntarily made, there being no fraud or deceit shown in the transaction.

Accordingly, the judgment order of the Superior Court of Cook County entered November 13, 1950, sustaining defendant's motion to strike plaintiff's amended complaint and dismissing plaintiff's suit is affirmed.

Judgment order affirmed.
Schwartz and Robson, JJ., concur.

45539

FRED STIEB,)
Appellee,) APPEAL FROM SUPERIOR COURT,
v.) COOK COUNTY.
CITY OF CHICAGO, a)
Municipal Corporation,)
Appellant.)

345 I.A. 505²

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff sued the City of Chicago for damages
allegedly sustained by a fall on a defective public
sidewalk March 1, 1948. The trial before a jury resulted
in a verdict of \$7,500. Appeal is taken from judgment
entered on the verdict.

Defendant contends that there was no competent
evidence to support the verdict and that the trial court
erred in denying its motion for a directed verdict and
judgment notwithstanding the verdict. In the alternative
it urges that a new trial should be granted for error in
giving certain instructions on behalf of the plaintiff.

The complaint charged that plaintiff "necessarily
and unavoidably stepped upon and against the broken and
jagged portions of the sidewalk and was caused to and did
stumble, slip and fall upon the ground with great force
and violence." Defendant maintains that plaintiff's fall
was occasioned by an accumulation of snow and ice on the
ground which caused plaintiff to slip, and that in such
circumstances there is no legal liability on defendant.

An examination of the facts shows that on March 1,
1948, plaintiff left his place of employment on west 26th

-2-

street and walked eastward on the north sidewalk of 26th street. Quoting his language (direct examination): "There was quite a snow and I was in the middle path walking east. There were two or three men walking where I was and I stepped aside to let them pass. As soon as they passed me I stepped back into the path and as soon as I did I fell. The heel was not straight and my foot went down and the next minute I know I was laying on the ground and my head pointing north. * * * At the place where I fell the sidewalk is lower than the surface of the ground to the south in Harding Square. * * * The only thing I can remember about it is as I stepped back in the path again, I fell. I fell in a hole--fell on the left side. My foot sank down and I fell over. That is all I can remember about it." In response to the following questions he testified:

"Q. Now, what was the condition of the sidewalk at that time concerning snow? A. Well there was snow on the ground.

"Q. About how much snow would you say? A. At least up to 3 inches."

On cross-examination he was questioned and gave these answers:

"Q. But, as you walked along there, you slipped and fell, isn't that right? A. Yes, sir.

"Q. And, you slipped on the snow, isn't that so? A. As I stated before, my foot couldn't get a hold. That is the reason I slipped.

"Q. Well, you slipped on the snow there that night. A. Yes."

He further testified that at the time he fell it had been

snowing hard off and on; that there was snow on the ground on the place where he had fallen which "looked like waves of snow"; that "as I was walking along prior to the accident I could see about 10 or 15 feet in front of me. I was watching the sidewalk in front of me as I walked along and immediately before I fell I saw snow on the sidewalk. My left foot slipped from under me and I fell. I saw nothing on the sidewalk but the snow."

Frances Miritello, a witness called on behalf of plaintiff, testified that she saw plaintiff at the viaduct where he crawled after the fall. She testified that it had snowed very hard that day and the day before; that it was icy out and the sidewalks where plaintiff stood were covered with snow and ice.

Plaintiff's contention that a defective sidewalk was the cause of his fall and injury rests principally upon certain photographs which were taken at a time when there was no snow or ice on the ground and which show depressions in the surface of the sidewalk. Plaintiff was permitted to identify one of these defects as the place where he fell; however, plaintiff unequivocally testified that the sidewalk where he fell was covered by snow and ice and that he could not see the surface of the sidewalk. Moreover, it was a physical impossibility for plaintiff to have seen the sidewalk where he fell, hidden as it was under a minimum of three inches of snow and ice. We think that under all the circumstances plaintiff's identification of a particular point on the

sidewalk as being that where he fell, from a photograph taken under conditions entirely dissimilar to those existing when he fell, is pure conjecture. In our opinion the evidence in this case clearly shows that this fall was occasioned by slipping on snow and ice and not as a result of any defect in the sidewalk. Even though plaintiff slipped in a hole, the proximate cause of his fall under the undisputed testimony was snow and ice, and, that being so, this case comes within the doctrine enunciated in Graham v. City of Chicago, 346 Ill. 638, and Strappelli v. City of Chicago, 371 Ill. 72, in both of which cases it was held that a city is not liable for injuries resulting from the general slipperiness of its streets and sidewalks due to the presence of ice and snow which have accumulated as a result of natural causes, even if the ice and snow are uneven, in irregular formations or in hillocks.

There being no evidence to support the plaintiff's case, the motion for a directed verdict should have been allowed, and accordingly the judgment of the Superior Court of Cook County is reversed.

Judgment reversed.

Robson, J., concurs.

Schwartz, J., took no part.

45550

345 I.A. 506¹

MARY WORTHAM,)
Appellant,)
v.) APPEAL FROM MUNICIPAL
WILLIAM H. McLEAN and)
ELEANOR McLEAN,) COURT OF CHICAGO.
Appellees.)

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff brought her action in forcible entry and
detainer in the Municipal Court of Chicago to recover
possession of premises owned by her and occupied by
defendants. Plaintiff appeals from a judgment entered
by the court without a jury, finding defendants not
guilty. No brief has been filed here on behalf of
defendants. ✓

Plaintiff purchased the property in question for
\$33,000 in the month of March, 1950, from the George C.
Bulloch Foundation, Inc., which had used the premises for
offices and a school. After obtaining possession in
March, 1950, plaintiff converted the three-story school
building into an apartment building consisting of six
apartments on the second floor and four apartments on the
third floor. She put in individual baths and running
water on the second floor, together with individual
kitchens and toilets for each of the apartments. On
the third floor she constructed four apartments with
separate kitchens, but with shared bath and toilet. In
September of 1950 she rented apartment No. 3 on the third
floor, consisting of two rooms, to the defendants, husband ||

1871-1872

1873-1874

1875-1876

1877-1878

The first of these years, 1871-1872, was a year of

great success.

The second year, 1873-1874, was a year of

great success, and the third year, 1875-1876,

was a year of great success, and the fourth year, 1877-1878,

was a year of great success, and the fifth year, 1879-1880,

was a year of great success, and the sixth year, 1881-1882,

was a year of great success, and the seventh year, 1883-1884,

was a year of

great success, and the eighth year, 1885-1886,

was a year of great success, and the ninth year, 1887-1888,

was a year of great success, and the tenth year, 1889-1890,

was a year of great success, and the eleventh year, 1891-1892,

was a year of great success, and the twelfth year, 1893-1894,

was a year of great success, and the thirteenth year, 1895-1896,

was a year of great success, and the fourteenth year, 1897-1898,

was a year of great success, and the fifteenth year, 1899-1900,

was a year of great success, and the sixteenth year, 1901-1902,

was a year of great success, and the seventeenth year, 1903-1904,

was a year of great success, and the eighteenth year, 1905-1906,

was a year of great success, and the nineteenth year, 1907-1908,

was a year of great success, and the twentieth year, 1909-1910,

was a year of great success, and the twenty-first year, 1911-1912,

-2-

and wife, for an agreed rental of \$23.00 per week, and took from them a deposit of \$23.00 as a guaranty of the proper use of the furniture and equipment and against any loss or damage by reason of the occupancy and the use of said furniture.

Defendants paid the rental of \$23.00 per week until March, 1951, when the housing expediter of the Chicago rental area reduced the rental on the premises from \$23.00 to \$16.00 per week. Thereafter defendants tendered the latter sum to the plaintiff which she refused. At the time of the trial at the claimed rental of \$23.00 per week, the defendants were in fault in the sum of \$143.00.

The trial court in finding for the defendants apparently proceeded upon the theory that the housing expediter's ruling was binding and that under the terms of that ruling reducing the rent from \$23.00 to \$16.00 per week defendants owed nothing and were not in default. The Housing and Rent Act of 1947, 50 U.S.C.A. Appendix, Sec. 1892 (c) provides:

"The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include--

"* * *

"(3) Any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are housing accommodations created by a change from a nonhousing to a housing use on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947; Provided, however, That any housing accommodations resulting from any conversion created on

or after the effective date of the Housing & Rent Act of 1949 [Apr. 1, 1949] shall continue to be controlled housing accommodations unless the President issues an order decontrolling them, which he shall issue if he finds that the conversion resulted in additional, self-contained family units as defined by regulations issued by him * * *."

We are of the opinion from a reading of the statute that the premises owned by the plaintiff come within the exception of section 1892 (c) (3) above. The premises in question, prior to the construction and conversion into housing units, had not been used for housing purposes. The property had been used as a school and extensive remodeling was required to fit it for housing purposes. It clearly appears that by such remodeling plaintiff created new housing accommodations within the terms of the above statute "by a change from a nonhousing to a housing use." It is clear, also, that additional housing accommodations were created by conversion as provided in the same statute. The purpose of the statutory exception was obviously to encourage new and additional housing by eliminating rent controls therefrom and easing the housing shortage. Woods v. MacNeil Bros. Co., 80 F. Supp. 920; Bancroft Realty Co. v. Alencewicz, 72 Atl. (2) 360. We think that the case at bar is very similar to the case of Woods v. Ginocchio, 180 F. (2) 484, (C.C.A. 9), where the court held that the landlord was not required to seek an administrative ruling as to the expediter's assumed control of the premises, but that he could await any action taken by the expediter to enforce his ruling and defend himself against the same.

-4-

The judgment of the Municipal Court of Chicago is therefore reversed and the cause remanded with directions to enter judgment for possession in favor of the plaintiff. ✓

Judgment reversed and cause
remanded with directions.

Schwartz and Robson, JJ., concur.

45565

345 I.A. 506²

GREAT AMERICAN INSURANCE COMPANY
NEW YORK, a corporation,

Appellant,

v.

STEPHEN KOTESA,

Appellee.

APPEAL FROM COUNTY

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Elman M. Miller, Jr. was the owner of a 1939
Plymouth automobile which was insured by plaintiff company
for collision damage in excess of \$50.00. On June 11,
1949, said automobile, while being driven by insured's
wife Betty, was damaged in a collision with defendant's
car to the extent of \$367.20. Subsequently the sum of
\$317.20 was paid by plaintiff to the insured and the
latter executed and delivered a receipt to plaintiff
under and by which the plaintiff became subrogated to
the rights of the insured against the defendant. Suit
was subsequently brought for \$317.20 and trial before a
jury in the County Court of Cook County resulted in a
verdict of not guilty. From judgment on the verdict
plaintiff appeals.

Plaintiff's contentions are that the verdict is
against the manifest weight of the evidence and that
error was committed in the giving of certain instructions
on behalf of defendant.

There is competent evidence in the record tending
to establish the following facts: Elman M. Miller, Jr.
at the time of the accident on June 11, 1949, worked

-2-

part time as a guard for the Atlas Protective Corporation and while engaged in this work used a jeep furnished by American Community Builders. His place of employment was in the Village of Park Forest, Illinois. On the night in question Betty, Elman's wife, had driven him to work in the Plymouth car. One Herbert, who worked with the husband, was not at the place of their joint employment when Betty and her husband arrived, and she went to the house of this man to pick him up and bring him to the job. Returning with a message for her husband that Herbert could not be located, she met her husband driving his jeep on Western avenue, near the intersection of Forest boulevard, in the Village of Park Forest. Western avenue, which runs north and south, at this point is a 2-lane highway about 20 feet wide, with a shoulder on each side the width of about one lane. Mrs. Miller in the Plymouth car was going south. Her husband in the jeep was proceeding north. The two vehicles were stopped at a point 50 or 60 feet north of the intersection, blocking both lanes of traffic, and the drivers engaged in a conversation about the absent Herbert. It was 12:30 a.m. The bright lights of both cars were burning. While the two vehicles were in such position the car of the defendant approached from the north on Western avenue. There was a collision between defendant's car and the Plymouth automobile near or in the intersection.

Elman Miller and his wife, testifying on behalf of plaintiff, and defendant and his wife, testifying on

-3-

behalf of defendant, were the only eyewitnesses. There is considerable conflict in the testimony on a number of material points. Mrs. Miller says that her car was moving at the time it was struck; defendant says that it was standing still. Elman Miller says that he had proceeded about 150 feet down the road when defendant's car passed him. Defendant says that "right after" he crossed the railroad tracks some 6 blocks north of the scene of the accident, the bright lights of the jeep were in his eyes; that he kept flickering his bright and dim lights to attract the jeep driver's attention without success; that the lights of the jeep were exceptionally bright because they had to patrol the area; that the blinding lights prevented him from seeing the automobile which was parked ahead of him, until after the jeep had passed him; that he did not see the southbound automobile until the jeep was 30 or 40 feet in back of him and that the Plymouth automobile was then standing still. There is considerable dispute as to the speed of defendant's car. Miller says that he had his lights dimmed and that he flashed his spotlight on the oncoming car to slow it down. Miller says defendant's car was being driven at 70 miles an hour; defendant says he was driving at 35 or 40 miles an hour. Miller says that his vehicle was not stopped for more than 30 seconds while he conferred with his wife; defendant says that for three-quarters of a mile the bright lights of the jeep were on him while he continued along at the same speed. Defendant says that

his car stopped approximately 15 feet from Forest boulevard and that his automobile did not move over 15 feet from the time of impact until it stopped. Miller says defendant's car skidded 70 feet before striking the Plymouth and that the latter car was moved 50 feet by the force of the collision.

We think that the discrepancies in the testimony tended to raise a question of fact as to whether or not plaintiff's insured was guilty of contributory negligence. Plaintiff contends that Miller was the bailor and the wife bailee of the Plymouth automobile and that where a bailor is himself free from negligence he may recover against a third person for damage to such automobile resulting from the concurrent negligence of the bailee and such third person. This proposition of law is not disputed by defendant. The facts, however, are challenged. We think the evidence above reviewed as to Mrs. Miller's mission on the evening in question tends to establish that she was the agent, rather than the bailee, of her husband, or at least was sufficient to raise a jury question.

Furthermore, we are of the opinion that there was evidence from which the jury might reasonably infer that Miller himself was negligent. There was evidence to the effect that he parked his jeep with its bright lights flooding the roadway ahead in such manner as to make it difficult for an approaching car to distinguish the tail lights of the other parked car, particularly in view of the fact that the vehicles driven by him and his wife

completely blocked the highway.

Complaint is made of certain instructions. We have examined these instructions and find no reversible error.

Although plaintiff has filed a 49-page brief citing numerous authorities, the length of the brief is not a criterion of the complexity of the questions to be decided. Here was a simple fact question, and we think there was evidence to support the jury's verdict. Further defenses argued we deem unnecessary to consider.

The judgment of the County Court of Cook County is therefore affirmed.

Judgment affirmed.

Robson, J., concurs.

Schwartz, J., took no part.

157

345 I.A. 507¹

45586

R. W. CRAM,)
 Appellee,)
)
 v.)
)
JOHN FRANK,)
 Appellant.)

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff sued for property damage to his automobile occasioned as a result of a collision with an automobile driven by defendant and allegedly through the latter's negligence. Defendant filed a counterclaim for damage to his automobile allegedly caused through the negligence of plaintiff. There was a trial before a jury in the Municipal Court of Chicago resulting in a verdict finding each party not guilty. Thereafter judgment in the amount of \$266.87 was entered for plaintiff on motion for judgment notwithstanding the verdict. Defendant appeals from that judgment. No brief has been filed on behalf of plaintiff.

The accident out of which the respective claims arose occurred on August 16, 1950, about 5:30 p.m. at the intersection of Ogden avenue and Main street in Lisle, Du Page County, Illinois. Plaintiff was operating his automobile eastward on Illinois Route 34, also described as Ogden avenue. Defendant was driving northward on Main street near the intersection of the two highways. There were no witnesses to the accident other than the parties. Defendant was called as an adverse witness by plaintiff,

-2-

and also testified in his own behalf. Plaintiff testified substantially that he was driving a 1949 Hudson automobile in the outer eastbound lane of Ogden avenue at about 25 miles per hour; that as he came over an overpass he saw defendant's stopped car some 500 to 800 feet to the east; that as plaintiff's car approached defendant's standing car and when plaintiff was a distance about 25 feet to the west, defendant suddenly drove out in front of plaintiff's oncoming car; that plaintiff applied his brakes and swerved his car in an attempt to avoid a collision; that plaintiff's car skidded about a car's length, struck the left front of defendant's car and pancaked, causing damage to the right side of plaintiff's car. Plaintiff further testified that in the presence of a police officer who appeared after the accident, defendant said, "I didn't see you." Plaintiff was corroborated as to this conversation by the police officer.

Defendant testified that he was driving a 1950 Plymouth automobile; that as he approached the intersection he stopped and waited for traffic on the road to clear; that he then proceeded out into the road; that at the time he pulled out into the road he could see to the crest of the overpass to the west and that there was no car coming toward him within that distance; that he entered into the intersection in first gear; that plaintiff's car suddenly appeared and struck him.

We think under all the evidence that it was a

-3-

question of fact for the jury and not for the trial court, as to whether one or the other, or both, of the parties to this accident were negligent. The jury may well have concluded that the defendant was negligent in not having seen the plaintiff's car before the accident and that the plaintiff was negligent in not having stopped his automobile or avoided defendant's car by pulling around the car which admittedly was being driven very slowly into the intersection. In any event, the trial court's action in entering judgment, notwithstanding the verdict, for the plaintiff, was, under all the facts and circumstances, unwarranted.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter judgments on the verdict.

Judgment reversed and cause
remanded with directions.

Schwartz and Robson, JJ., concur.

45594

345 I.A. 507²

CHICAGO COMPOSITION, INC.,
Individually and as Assignee
of the Frank J. Geller
Press, a corporation,

Appellee,

v.

LA SALLE NATIONAL BANK, as
Administrator of the Estate
of Otto G. Hess, Deceased,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff sued defendant administrator of the
estate of Otto G. Hess for the sum of \$1,000, for the
alleged misappropriation of a check in that amount. The
case was tried without a jury and judgment was entered
for plaintiff against the defendant in the amount of the
claim. This appeal is from that judgment.

Otto G. Hess during his lifetime was president of
the plaintiff company. On September 5, 1950, the Frank J.
Geller Press drew a check payable to plaintiff company for
\$1,000. This check, endorsed "Chicago Composition, Inc.,
Otto G. Hess, Pres.," was cashed over the counter at the
LaSalle National Bank and the proceeds given to Hess in
cash. On the day following the cashing of the check Hess
died. These facts were proven by plaintiff and were not
disputed.

In furtherance of its prima facie case, plaintiff
produced the comptroller of its company, Norman Landers,
who testified that he was an attorney and an accountant;
that he had charge of the books and records of the plain-

tiff company; that he had examined the ledger sheet of the account between the Frank J. Geller Press and the plaintiff company and that it does not appear on the ledger sheet (which he produced in open court, plaintiff's exhibit 3) that Geller Press was credited with the payment of the \$1,000 by the plaintiff company. On cross-examination he testified that he had nothing to do with the keeping of the record which he had examined; that he was not an employee until the November following the issuance of the check, although prior to that time he had made an audit in connection with an application for an R.F.C. loan; that he would have no way of knowing that the entries prior to November 3, 1950, were true and correct and complete; that he knew that no credit in favor of Geller Press was entered on the ledger sheet; and that there is no record of any such credit on the books of the company.

Elliott Frank was called on behalf of the plaintiff and testified that he was vice-president of the LaSalle National Bank; that the \$1,000 check in controversy was not deposited to the credit of the plaintiff company, but the proceeds were paid over the counter to Hess.

The defendant introduced no testimony, and the foregoing was all the testimony introduced on either side.

Defendant claims (1) that the proof failed to show any misappropriation of funds by the decedent; (2) that there was no competent evidence that the plaintiff company did not receive the \$1,000 in question; and (3) that plain-

tiff not having produced its books of account, it would be presumed that those records would show that plaintiff company received the proceeds of the check.

We are of the opinion that the proof introduced by plaintiff was sufficient to establish a prima facie case. Defendant urges that there was no evidence that the money was not expended for proper corporate purposes and that it did not appear that the money was not immediately turned over to the corporation. In our view of this case plaintiff did not have the burden of accounting for the proceeds of the check, but on the contrary, having established that the money came into the hands of Hess, the burden was upon the defendant to show that the proceeds were used for corporate purposes and to establish any other defense it might have. While the affidavit of merits in the case is extremely sketchy, consisting principally of the conclusion, "defendant denies that it is indebted to the plaintiff in the sum of One Thousand Dollars (\$1,000.00)," if by such denial defendant intended to prove payment, it would then have the burden of proving such affirmative defense. Defendant says in its brief: "It is doubtless true that if Otto G. Hess were alive, he would be expected to come forward and explain the transaction and tell what was done with the money." We are of the opinion that the same burden rested upon his personal representative.

Defendant urges that the testimony of the witness Landers to the effect that the ledger sheet of the plaintiff company does not show any credit to the Geller Press

for the \$1,000 check received by Hess was incompetent. It bases its contention upon the authority of LeRoy State Bank v. Keenan's Bank, 337 Ill. 173, where an auditor who did not make the entries on the books and who was unable to testify to the correctness of the entries was permitted to testify to certain conclusions arrived at from an examination of the books. The court there said (p. 193): "Since the books were not shown to be competent evidence the statement of the conclusions reached by a consideration of them was not competent evidence and should not have been admitted." However, an analysis of that case shows that it does not sustain the contention for which it is urged. There the account about which the witness testified was material as bearing upon the question as to whether or not the defendant bank was indebted to the plaintiff bank on a guaranty to pay certain deficiencies under a guaranty agreement. The auditor who made the examination, as heretofore indicated, was unable to testify to the correctness of the account inasmuch as he had nothing to do with the making of the entries but had been hired merely for the purpose of preparing a condensed statement for use at the trial. When this expert sought to testify as to these figures, objection was made on the ground that no proper and sufficient foundation had been laid because the records were not in evidence and because the questions asked permitted the witness to put his own construction on the contract and to state the account accordingly. Later the books were offered in evidence but an objection to their admission

was sustained on the ground that they were not properly qualified. In the instant case no such objection was ever made. The witness Landers was permitted to testify without objection, on direct examination, that the ledger sheet from which he was testifying was a record of the plaintiff company and that it showed no credit to the Geller Press of the \$1,000 check. After cross-examination, during which the fact was brought out that the record from which the witness testified was not kept by him and that he was unable to testify from his own knowledge to its truth and correctness, a motion was made to strike all of his testimony bearing on this subject matter, which motion was denied. At no time was any objection made as was done in the LeRoy State Bank case, that in the absence of the books and records themselves any testimony bearing on their contents would be incompetent. Defendant at no time during examination requested the books.

As we read the LeRoy State Bank case, it is authority for the procedure adopted by the plaintiff. The plaintiff was obligated to establish a negative fact, namely, that there was no entry on the plaintiff company's books showing a credit to Geller Press. This could only be established by an examination of the complete account, and it was entirely competent for this to be done by one qualified by training and experience to ascertain such a fact from an examination of the books. The procedure is expressly authorized in the LeRoy State Bank case, where the court said (p. 192):

"While the results of the examination of voluminous documents, writings, records and books may be proved by expert accountants or other competent person who has made the examination, the documents, records or books upon which the examination is based must be of such a character as to be themselves admissible in evidence. The oral evidence is admissible because the voluminous character of the instruments of evidence precludes their examination in court, and the testimony to results reached by their examination is merely a statement of what those instruments show."

If any question was being raised that the books themselves should have been produced so that defendant might have had opportunity to check the statements of the witness, then the objection should have been made on that ground, and being made here for the first time comes too late.

Defendant in its brief urges that, plaintiff not having produced its books of account, there is a presumption that the books would show that the plaintiff corporation received the money. For the reasons heretofore outlined we find no merit in such contention.

For these reasons the judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Schwartz and Robson, JJ., concur.

45628

MINGO BROWN,)
Appellant,)

v.)

OLLIE MOORE and ODEAL)
MOORE,)
Appellees.)

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

345 I.A. 508

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff appeals from a decree of the Circuit
Court of Cook County dismissing his complaint for want
of equity. The complaint was entitled "Bill of Review
for Newly Discovered Evidence."

The bill of review alleges that a complaint had
theretofore been filed wherein plaintiff sought to have
a deed executed by him and delivered to defendants can-
celled and set aside for the alleged reason that when
plaintiff executed the deed on August 11, 1948, he was so
intoxicated as to be unable to understand what he was
doing; that after a hearing on the complaint and answer
which denied the intoxication, the trial court dismissed
the complaint for want of equity, and on November 27, 1950,
the decree of the trial court was affirmed by the Supreme
Court of this State. The bill of review further alleges
that while the cause was pending in the Supreme Court
plaintiff discovered new matters of consequence, particu-
larly, that Ollie Moore and Odeal Moore, grantees in the
deed, were not husband and wife on the date of the
execution of the deed, to-wit, August 11, 1948, and did
not become husband and wife until December 15, 1949; that

1. 1. 1.

2. 2. 2.

3. 3. 3.

4. 4. 4.

5. 5. 5.

6. 6. 6.

7. 7. 7.

8. 8. 8.

9. 9. 9.

10. 10. 10.

11. 11. 11.

12. 12. 12.

13. 13. 13.

14. 14. 14.

15. 15. 15.

16. 16. 16.

17. 17. 17.

18. 18. 18.

19. 19. 19.

20. 20. 20.

21. 21. 21.

22. 22. 22.

23. 23. 23.

24. 24. 24.

25. 25. 25.

26. 26. 26.

27. 27. 27.

28. 28. 28.

29. 29. 29.

during this sixteen month period they lived in an open and notorious state of adultery; that neither plaintiff nor his attorney knew or could have known by reasonable diligence of this fact, and that they first learned of this newly discovered evidence about January 20, 1950.

The trial court, after considering the allegedly new matter recited in the bill of review, dismissed the said bill for want of equity.

Plaintiff urges here that if he could have produced evidence that the defendants were not married to each other at the time the deed was executed, a different result would have been reached in the cause which sought to set aside the deed.

The sole issue in the original case was whether or not plaintiff was by reason of intoxication in such condition that he was incapable of understanding the nature of the transaction in which he was then engaged, namely, the execution and delivery of the deed to defendants, who in such deed were described as Ollie Moore and Odeal Moore, his wife. (Odeal Moore is the daughter of plaintiff.) The trial court, subsequently affirmed by the Supreme Court, decided that no such a degree of intoxication existed, and confirmed the conveyance. We fail to see how the fact that defendants were not husband and wife at the time of the conveyance could have the remotest bearing on whether or not plaintiff was at such time intoxicated. Newly discovered evidence sufficient to set aside a decree must be such as relates to a matter in issue in

-3-

the original hearing. Waterman v. Hall, 298 Ill. 75, 81.

There is no merit in this appeal. The decree of the Circuit Court of Cook County is affirmed.

Decree affirmed.

Schwartz and Robson, JJ., concur.

160

345 I.A. 509

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

Appellees.

This is an action at law in the Municipal Court by James Frederick Cheney and Jane Cheney, plaintiffs (appellants), against Ceasar Garibaldi and Aurelia Garibaldi, defendants (appellees), for principal and interest claimed to be due on a certain promissory note signed by said defendants, in the amount of \$3,700.00, payable to the order of bearer with interest at six per cent per annum, falling due on or before March 20, 1933, with interest after maturity at seven per cent per annum by an agreement dated July 23, 1935, executed by Edwin H. Cheney and Ceasar Garibaldi. The time of the payment of the note was extended by the parties for five years from March 20, 1935, with interest at four per cent per annum payable semiannually. The interest was evidenced during said extended period by 10 extension interest notes of even date, in the sum of \$74.00 each, which extension interest notes were executed by defendants and one fell due each six months after the date of said extension agreement. Extension interest coupon notes numbers 1 and 2 were paid and numbers 3 to 10 were not paid. Plaintiff James Frederick Cheney is the owner of an undivided 4/10th interest of the principal note

-2-

and plaintiff Jane Cheney is the owner of an undivided 6/10th interest of said principal note and interest coupons.

The interest of plaintiffs was acquired through and by the last will and testament of Edwin H. Cheney, deceased. The principal and interest alleged to be due was in the sum of \$7,368.92.

Defendants filed their defense to said action. They denied that plaintiffs were the owners of said principal note and interest coupons and stated that said notes had never been inventoried in the estate of Edwin H. Cheney, who had died a resident of St. Louis County, Missouri, and that the action, if any, could only be maintained by the executor or personal representative of said deceased. Defendants also denied that they were indebted in any sum whatsoever on said notes, and as a defense pleaded the Statute of Limitations of Illinois.

A reply was filed by plaintiffs to the defense of defendants. They alleged that the estate of Edwin S. Cheney was closed on June 18, 1946, and the executors discharged and the existence of the indebtedness sued on was not learned about until October of 1947. The plaintiffs became the owners of the indebtedness sued upon through decedent's will at the time of his death, subject only to the rights of the legal representatives of decedent's estate during the period of administration. When the estate was closed on June 18 plaintiffs became the owners of the indebtedness, and on March 18, 1950, the

-3-

date of institution of this action, had the right to bring a suit. At the trial the defendants did not urge the defense of the statute of limitations as ^{to} the principal note but only as to the first nine interest coupons. The court, after a hearing on the merits, found for the defendants and dismissed the action.

Plaintiffs urge as grounds for reversal: (1) The court erred in holding that under the law of the State of Missouri, the plaintiffs were not the owners of the indebtedness sued upon and could not maintain a suit thereon against defendants. (2) The court erred in refusing to allow one of plaintiffs' witnesses to testify to a telephone conversation with defendant, Ceasar Garibaldi. (3) The court erred in sustaining a motion to strike from the record certain letters, being Plaintiffs' Exhibits numbers 4, 5, 6 and 8, which were necessary to prove the loss of the principal note sued upon.

The statute of the State of Missouri (sec. 461.540 Mo. Rev. Stat. 1949 Administrators de bonis non) governing plaintiffs' right to sue, provides that it is only necessary to have letters of administration issued after an estate has been closed, where there are unpaid allowed demands against the estate or upon good cause shown. The case of Pullis v. Pullis, 127 Mo. Appeals Reports, 294, 105 S.W. 275, interprets the statute:

"It is clear that the Legislature did not intend that every discovery of such assets should invoke a new administration, but that this should occur only when there were allowed demands still unpaid, or perhaps, in

instances covered by the words 'in cases not otherwise provided for.' Presumably if there are no such demands, and no such special circumstances calling for a new administration, none ought to be granted, but the heirs and legatees who are entitled to the newly discovered assets ought to be left to settle their rights by ordinary process in law or equity or by a voluntary distribution among themselves."

In the Edwin H. Cheney estate there were no claims outstanding and no special reason why the assets, discovered after the estate had been closed, could not be distributed to the persons entitled thereto. Plaintiffs were the only ones entitled to this distribution and it is apparent that the courts of Missouri would not require a useless act. (Painter v. Painter, 124 S.W. 561.)

Defendants cite the case of Pullis v. Pullis, 178 Mo. 683, a case involving the same parties as were involved in Pullis v. Pullis, 127 Mo. Appeals Reports, 294, heretofore discussed. This was decided by the lower court on the basis of the revised statutes of 1899 and not on the statute as subsequently amended on March 26, 1903. The case cited by defendants, therefore, is clearly not in point and the trial court was in error in ruling that plaintiffs could not maintain their action on this basis. //

The court refused to allow plaintiffs' witness, Walter L. Pope, an assistant trust officer of the Mercantile-Commerce Bank & Trust Co. of St. Louis, Mo., which bank with plaintiff James F. Cheney, were the executors of the estate of Edwin H. Cheney, deceased, to testify as to a telephone conversation he had with defendant, Ceasar Garibaldi, pertaining to the notes sued upon. After this conversation, and pursuant to it, he wrote a

-5-

letter to Ceasar Garibaldi (Plaintiffs' Exhibit 3) in which he referred to such conversation. Defendants' lawyer wrote Pope in response to this letter. Considering these circumstances the mere fact that the witness did not know defendant Ceasar Garibaldi prior to the conversation, or his voice, did not affect the credibility of his testimony as to the telephone conversation. 31 C.J. 908; Morris v. Finkelstein, 145 S.W. 439; Estate of Wood v. Tyler, 256 Ill. App. 401.

We are next called upon to decide whether or not certain letters offered by plaintiffs as Exhibits numbers 4, 5, 6 and 8, and admitted subject to defendants' motion to strike, were admissible. Defendants at conclusion of plaintiffs' testimony renewed their motion to strike and the court allowed it.

Plaintiffs' Exhibit 4, a letter from defendants' lawyer, refers to Plaintiffs' Exhibit 3 written by Pope to the defendants. Exhibit 4 also refers to defendants' dealings with Walter S. Holden, attorney for Edwin H. Cheney, the decedent, who last had the principal note upon which this suit is based. A letter received in due course purporting to be written or sent by a person in answer to another letter is admissible in evidence, where the alleged writer admits he received and replied to a letter of the character claimed to have been written to him. 32 C.J., sec. 706, page 609; Wignore on Evidence, vol. 3, sec. 702; George B. Wellon, Executor v. Daly, 93 N.H. 150; Eastman v. United Marble Co., 244 Ill. App. 256.

-6-

Therefore, Plaintiffs' Exhibit 4 should not have been stricken.

Plaintiffs' Exhibits 5, 6 and 8 were letters explanatory of Plaintiffs' Exhibits 3 and 4 and each is dependent upon the other and together show the continuity of the search made by the bank as the coexecutor for the lost principal note, and as such should have been admitted in evidence for this purpose.

The judgment of the trial court dismissing the case is reversed and the cause remanded with directions to proceed pursuant to the findings of this opinion.

Judgment reversed and cause
remanded with directions.

Tuchy, P. J., concurs.

Schwartz, J., took no part.

45542

THE BRITE-HOUSE COMPANY,
a corporation,

Appellant,

v.

R. H. CARY,

Appellee.

345 I.A. 509²

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

Plaintiff (appellant) seeks to recover from defendant (appellee) rental of \$500.00 per month for the months of September, 1947, through May of 1948, or \$4,500.00. Defendant had been a month-to-month tenant occupying space in the building owned by plaintiff at a rental of \$50.00 per month. On July 7, 1947, plaintiff served defendant with a notice purporting to terminate the tenancy for the premises as of August 31, 1947. Included as a part of the notice to terminate the tenancy was the following language:

"and if you continue to occupy the said premises as tenant after August 31, 1947, you will do so at a rental of \$500.00 per month."

After hearing, the trial court found for the defendant.

Plaintiff contends that the trial court erred in finding for the defendant for two reasons: (1) Where a tenant holds over after expiration of tenancy with notice that new terms will be required, his assent will be presumed. (2) There is an implied contract for a tenant holding over to pay increased rent.

Defendant contends that plaintiff's theories do not apply because the five-day notice served by plaintiff on defendant was not in proper form. We will, therefore, consider defendant's contention first.

, 1904

... ..

... ..

... ..

, 1904

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

, 1904

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

The undisputed testimony is that defendant at one time occupied three areas in the building: The West Bay on the first floor, office space on the second floor, and storage space in an areaway between plaintiff's building and the building next door. Defendant surrendered possession of the space occupied on the first floor in February of 1947; on the second floor sometime prior to September of 1947, and the storage space between the buildings in December of 1947. In the notice of termination the only space described is "The West Bay of the First Floor," which was one of the spaces that had been occupied by the defendant but was not occupied by him at the time of the service of notice.

A landlord must give 30 days' notice in writing to terminate a month-to-month tenancy. (Ill. Rev. Stat. 1947, chap. 80, sec. 6.) Such notice must accurately describe the leased premises. Plaintiff's notice did not accurately describe the premises leased and, therefore, was not sufficient to cancel the tenancy. Sheldon v. Sutherland, 222 Ill. App. 598. The notice, being of no effect, the month-to-month tenancy was continued on the same basis that existed prior to the service of such notice. ✓

Plaintiff's contentions could only be considered if its notice of termination was sufficient. We have held that it was not. Therefore, it is not necessary for us to consider them or the authorities in support thereof. The judgment of the Superior court is affirmed. ✓

Judgment affirmed.

Tuohy, P.J., concurs.
Schwartz, J., took no part.

2523
Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

October Term, A. D. 1951.

General No. 9812

Agenda No. 14.

WILHELMINA C. MENKE, ADMINISTRATOR
OF THE ESTATE OF LUIE H. MENKE,
DECEASED,

Plaintiff-Appellee,

vs.

CHICAGO & ILLINOIS MIDLAND RAILWAY
COMPANY, A CORPORATION,
Defendant-Appellant.

345 I.A. 604¹

Appeal from
Circuit Court of
Mason County.

Reynolds, J.

This is a suit brought by Wilhelmina C. Menke, Administrator of the Estate of Luie H. Menke, deceased, plaintiff-appellee, hereinafter called the plaintiff, against Chicago & Illinois Midland Railway Company, a corporation, Defendant-Appellant, hereinafter called the defendant, for damages for the wrongful death of the plaintiff's intestate.

The cause arose out of a collision between a train of defendant and a road grader being operated by the plaintiff's intestate at a highway crossing in the township of Havana, Mason County, Illinois on October 28, 1947 at about 10:45 A. M. A jury trial resulted in a verdict for \$6,500.00 damages in favor of plaintiff, on which judgment was entered on the verdict and from which judgment defendant has appealed to this court.

At the point where the collision occurred, the township road ran in an easterly and westerly direction parallel to the tracks of defendant. Deceased, aged 70, was grading the township road and was proceeding in a westerly direction. The train was proceeding easterly when plaintiff's intestate reached a point where the township road turned in a northerly direction, he crossed the tracks of the defendant. It appears from the evidence that the deceased partially raised his grader blade just prior to

STATE OF ILLINOIS
Circuit Court
Third District

October Term, A. D. 1931.

Agenda No. 14.

General No. 9515

3451A.804

Appeal from
Circuit Court of
Madison County.

WILLIAM O. BAKER, ADMINISTRATOR
OF THE ESTATE OF LUIS E. BAKER,
DECEASED,
Plaintiff-Appellee,

vs.

CHICAGO & NORTHWESTERN RAILWAY
COMPANY, A CORPORATION,
Defendant-Appellant.

Verdict, 1.

This is a writ granted by William O. Baker, administrator

of the estate of Luis E. Baker, deceased, plaintiff-

appellee, hereinafter called the plaintiff, against Chicago &

Northwestern Railway Company, a corporation, defendant-

appellant, hereinafter called the defendant, for damages for

the wrongful death of the plaintiff's intestate.

The cause arose out of a collision between a train of

defendants and a road engine being operated by the plaintiff's

intestate at a railway crossing in the township of Havana, Lucas

County, Illinois on October 18, 1927 at about 10:00 A. M. A fat-

tal resulted in a verdict for \$5,000.00 damages in favor of

plaintiff, on which judgment was entered in the circuit and from

which judgment defendant has appealed to this court.

At the point where the collision occurred, the township

road ran in an easterly and westerly direction parallel to the

tracks of defendant. Defendant, aged 70, was driving the township

road and was proceeding in a westerly direction. The train was

proceeding easterly when plaintiff's intestate reached a point

where the township road turned in a northerly direction, he

crossed the tracks of the defendant. It appears from the evidence

that the deceased partially raised his right hand just prior to

making the turn to go on to the tracks and that after he made the turn, he stopped before going on the tracks and raised the grader blade still more, as he left another small pile of debris at that point.

The plaintiff in counts one and two of her complaint, charged substantially the same acts of negligence which are as follows:

a. Failing to keep the lands of the defendant adjacent to said railroad track clear of trees and brush.

b. Propelling said locomotive at a greater rate of speed than was reasonable and proper under the circumstances.

c. By failing to ring the bell or blow the whistle a distance of at least eighty (80) rods from the place where railroad crosses or intersects said public highway, and failing to continue the said ringing and whistling until said highway was reached as is required by the statutes of the State of Illinois in such case made and provided, particularly Chapter 114, paragraph 59, Ill. Smith-Hurd annt'd Per. Ed.

d. By failure to keep a proper look-out for vehicles attempting to cross said railroad crossing.

Count three was a charge of general negligence against the defendant. Each count alleged due care on the part of plaintiff's intestate. The defendant denied the charges of negligence and the exercise of due care by plaintiff's intestate.

The defendant contends that the plaintiff failed to prove any negligence on the part of the defendant and that the plaintiff presented no evidence whatsoever to sustain her necessary allegation that the deceased was in the exercise of due care and caution for his own safety. The defendant asks that the case be reversed on the grounds that the trial court erred in

asking the train to go on to the tracks and that after he was
 the train, he stopped before going on the tracks and raised the
 power blade still more, he left another small pile of debris
 at that point.

The plaintiff in counts one and two of her complaint,
 charged substantially the same acts of negligence which are as
 follows:

a. Failing to keep the hands of the defendant
 adjacent to said railroad track clear of trees and
 brush.

b. Propelling said locomotive at a greater rate
 of speed than was reasonable and proper under the
 circumstances.

c. By failing to ring the bell or blow the
 whistle a distance of at least eighty (80) rods
 from the place where railroad crosses or inter-
 sects said public highway, and failing to continue
 the said ringing and whistling until said highway
 was reached as is required by the statutes of the
 State of Illinois in such cases made and provided,
 particularly Chapter 114, Paragraph 50, 111. Statute
 Book ann'd Par. 50.

d. By failure to keep a proper look-out for
 vehicles attempting to cross said railroad crossing.
 Count three was a charge of general negligence against the
 defendant. When count alleged due care on the part of plain-
 tiff's intestate. The defendant denied the charges of negli-
 gence and the exercise of due care by plaintiff's intestate.

The defendant contends that the plaintiff failed to prove
 any negligence on the part of the defendant and that the plain-
 tiff presented no evidence whatsoever to sustain her necessary
 allegation that the deceased was in the exercise of due care
 and caution for his own safety. The defendant asks that the
 case be reversed on the grounds that the trial court erred in

denying the motions of defendant at the close of plaintiff's evidence, at the close of all the evidence and for judgment in favor of defendant notwithstanding the verdict.

In order to dispose of this case, we find it necessary to decide only if there is any evidence, taken in its aspect most favorable to the plaintiff, which shows that deceased was in the exercise of due care and caution for his own safety at the time of the accident. If there is no evidence tending to show that the deceased was in the exercise of due care and caution for his own safety at the time and place in question, the judgment cannot stand. (Provengano v. I. C. ² R. R. Co., 357 Ill. 197²).

The only witness offered by the plaintiff to establish due care and caution on the part of the deceased was Howard Siebtenborn, whose testimony in regard to that question, as abstracted, was as follows: "On October 28, 1947, at about 10:30 A. M., I was on the south side of the track about 600 or 700 feet west of the public road crossing and west of the lane that leads to the Cimco Farm house, and was on the right of way south of the fence line. I was cleaning a storm sewer. I saw the road grader approach the track. This road grader was a regular maintainer with the motor to the back of the blade. The cab was behind the motor. It was coming down along the track headed west. When I saw it, it was near the crossing. I was on foot at the time. The road grader came to a stop. At that time the train was already past me and had passed the farm crossing, had whistled for the public crossing and about the time I saw this situation it whistled again. Then the grader started up very slow. Right after that the train obstructed my view and although I did not see the collision, I heard the sound of it. The train stopped immediately with the caboose on the west side of the crossing. There were about 13 cars on the train. I went to the scene of the accident and saw that the train had carried the road grader about 50 feet and deposited it on the north side of the

denying the contents of defendant's statement at the close of plaintiff's evidence, at the close of all the evidence and for judgment in favor of defendant notwithstanding the verdict.

In order to dispose of this case, as find it necessary to

decide only if there is any evidence, taken in its proper context favorable to the plaintiff, which shows that defendant was in the exercise of due care and caution for his own safety at the time of the accident. If there is no evidence tending to show that

one deceased was in the exercise of due care and caution for his own safety at the time and place in question, the verdict cannot stand. (Providence v. I. O. O. F., 107 Ill. 137.)

The only witness called by the plaintiff to establish the

care and caution of the party of the deceased was Edward H. Thompson, whose testimony is relevant to that question, as stated, was as follows: On October 25, 1907, at about 10:30 a. m., I was on the

south side of the track about 50 or 700 feet west of the bridge

road crossing and west of the line that leads to the Chicago River house, and was on the right of way north of the fence line. I was standing a short way. I saw the road freight approach the track.

This road freight was a regular maintenance train the color to the back of the bridge. The car was loaded the road. It was coming down along the track headed west. When I saw it, it was near the crossing.

I was on foot at the time. The road freight came to a stop. At

that time the train was already past me and had passed the farm

crossing, and continued for the bridge crossing and about the time I saw this maintenance train it whistled again. Then the freight started up

very slow. About after that the train continued to view and

though I did not see the collision, I heard the sound of it. The

train stopped immediately with the engine on the west side of the

crossing. There were about 13 cars on the train. I went to the

scene of the accident and saw that the train had carried the road

freight about 50 feet and deposited it on the north side of the

track. The road grader was hit on the left rear wheel. Deceased was thrown clear of the road grader. The only ones present at that time were the train crew. I had a clear and unobstructed view of the public crossing. This train was moving not over 35 miles an hour when I first saw it. It was whistling for all crossings and gave a warning signal for the last crossing signal. That is all the signals I remember. The engineer applied the brakes on the locomotive but I could not tell how close the engine was to the crossing when the brakes were applied. I had known the deceased all my life. I work on the farm and have nothing to do with the maintenance of rolling stock. It was a nice day to work. There was nothing unusual about the operation of this road grader and I had seen the deceased at this point many times before with this same road grader." On cross examination, he testified, as abstracted, as follows: "The train was going towards Topeka and at the time I saw it, had already passed the private farm crossing going into Cimco Farm. At that time the road grader was stopped and I would not think there was anything to interfere with deceased's vision to see the train. I saw the deceased clearly and I think he could see me. At that time the road grader was stopped near the track and the train was past me."

James P. Greeley, the engineer, testified that the regular whistle was sounded and continued until he reached the first crossing; that he saw the road grader at a point fifty feet before reaching the Cimco Farm crossing; that he saw it turn the corner and stop; that he gave a series of short blasts of the whistle; that the bell was ringing when he left Quiver and was still ringing when he stopped after the accident; that the speed of the train was between 30 and 35 miles per hour; that when he saw the road grader start, he applied the brakes in emergency and that the visibility was good.

The plaintiff presented a considerable amount of evidence

time. The road grader was hit on the left rear wheel. The road grader was struck by the train. The only one present at that time was the train crew. I had a clear and unobstructed view of the road grader. This train was moving over 25 miles an hour. I first saw it. It was waiting for all crossings and gave a warning signal for the last crossing signal. That is all the signal I saw. The engineer applied the brakes on the locomotive and I could not tell how long the engine was in the crossing when the crossing was closed. I had known the crossing was closed. I was on the track and was waiting to do with the maintenance of the crossing. It was a case of no work. There was nothing to do. I saw the crossing of this road grader and I had seen the crossing at this point and I was before with this road grader. On cross examination, as testified, as explained, as follows: The train was going towards the crossing and at the time I saw it, it was already passed the private track crossing. That is the fact. At that time the road grader was stopped and I could not tell. There was nothing to interfere with the crossing's vision to see the train. I saw the crossing clearly and I think he could see it. At that time the road grader was stopped and the crossing was closed. The train was past it.

James P. Dineen, the engineer, testified that the regular whistle was sounded and continued until he reached the first crossing; that he saw the road grader at a point fifty feet before reaching the third crossing; that he saw it turn the corner and stop; that he gave a series of short blasts of the whistle; that the bell was ringing when he left the driver and was still ringing when he stopped after the accident; that the speed of the train was between 20 and 25 miles per hour; that when he saw the road grader about, he applied the brakes in emergency and that the visibility was good.

The plaintiff presented a considerable amount of evidence

to prove that there were four or five large locust trees closer than five hundred feet west of the crossing where the accident occurred which might have obstructed the view of the deceased as he operated his road grader approaching this crossing. We do not find this evidence very persuasive in view of the plaintiff's own witness, Howard Siebtenborn and defendant's exhibits numbers 1, 2 and 3.

In Burns v. Chicago & Alton Railroad Co., 223 Ill. App. 439, it was said: "It is a generally recognized fact that railroad crossings are dangerous places, and it is the settled law in this State that one who approaches a railroad crossing must approach it using an amount of care commensurate with the known danger. In Sunnes v. Illinois Cent. R. Co., 201 Ill. App. 378, this court held that the fact that the plaintiff knew that his view of the track was partially obstructed by a hedge along the side of the highway required care on his part in proportion to the known danger".

"In Toledo, W. & W. R. Co. v. Jones, 76 Ill. 311, it was said: 'There is nothing which can relieve a person from the duty of exercising due care and caution at a railroad crossing. It is not always the case that trains are on time, as is well known, hence the pressing necessity of using vigilance, care and caution at all times.' In Chicago, B. & Q. R. Co. v. Damerell, 81 Ill. 450, it was said: 'This court has repeatedly declared the doctrine that it is the duty of persons about to cross a railroad track to look about them, and see if there is danger; not to go recklessly upon the track, but take the proper precautions themselves to avoid accidents at such places.' In Lamarre v. Cleveland, C. C. & St. L. Ry. Co., 217 Ill. App. 296, it was said: 'Where a railroad train and a person traveling on the highway each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but it is the duty of the traveler, in obedience to the known custom of the country, to

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

not find this evidence very persuasive in view of the quality of the evidence, and the fact that the evidence is not very recent.

Q. 113 (12) ANALYSIS OF DATA & CONCLUSIONS V. G. V. 113

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 01-11-2001 BY 60322 UCBAW

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE UNIVERSITY OF CHICAGO PRESS

...of the

THE UNIVERSITY OF CHICAGO

[illegible]

not always the case and should be on file, as is well known, before the President's receipt of such information, and the President

... ..

It is the only of persons who is given a million -
to look at that, and see if there is danger; not to work-

to avoid accidents at such places. In a word, I consider,

1940-1941

and for the purpose of the investigation, the following information is being furnished:

reveler, in obedience to the known custom of the country, to

stop and not attempt to pass in front of the advancing train.' In Lake Shore & M. S. R. Co. v. Hart, 87 Ill. 529, the court said: 'This court has, time and again, decided that it was the duty of every person about to cross a railroad track, to approach cautiously, and endeavor to ascertain if there is present danger in crossing, as all persons are bound to know that such an undertaking is dangerous, and that they must take all proper precautions to avoid accidents in so doing, otherwise they could not recover for injury thereby received'."

The question of due care on the part of a plaintiff is a question for the jury when there is any evidence given on the trial which, with any legitimate inference that may be legally and justifiably drawn therefrom, tends to show the use of due care, but where the evidence, with all legitimate inferences that may be legally and justifiably drawn therefrom, does not tend to show due care on the part of plaintiff the trial court is justified in instructing the jury to return a verdict for defendant. (Greenwald v. The Baltimore and Ohio Railroad Company, 332 Ill. ⁶²⁷~~632~~.)

In this case it seems clear from the evidence taken in its most favorable light, that the deceased would have seen the approaching train in ample time to have avoided the collision if he had only looked, and that he was not in the exercise of due care as a matter of law.

For the reasons stated, the judgment of the circuit court is reversed.

Reversed.

that will not attempt to pass in front of the following cases.

In State v. E. J. Co. v. E. J. Co., 87 Ill. 219, the court

said: "This court has, from time to time, decided that it was the

duty of every person whose business it was to approach

caution, and endeavor to ascertain if there is present danger

in crossing, as all persons are bound to know that such an

action is dangerous, and that they must take all proper precautions

to avoid accidents in so doing, otherwise they would not recover

for injury thereby received."

The question of the care of the part of a plaintiff is a

question for the jury when there is any evidence given on that

trial which, with any legitimate inference there may be legally and

justifiably drawn therefrom, tends to show the use of due care, but

where the evidence, with all legitimate inferences that may be legally

and justifiably drawn therefrom, tends to show the use of due care

the fact of liability and trial court is justified in withdrawing

the jury to return a verdict for defendant. Greenfield v. The

Ballou and Ohio Railroad Company, 217 Ill. 427.

In this case it was held that the evidence when in the

most favorable light, that the deceased would have been the

approaching train in ample time to have avoided the collision if

he had only looked, and that he was not in the exercise of due

care as a driver of a car.

For the reasons stated, the judgment of the circuit

court is reversed.

Reversed.

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

October Term, A. D. 1951

Term No. 51-0-21.

Agenda No. 15.

FINIS PARKER,

Plaintiff-Appellee,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
a Corporation,

Defendant-Appellant.

)
) 3451.A. 604²
)
) Appeal from the
) City Court of
) Granite City,
) Illinois.
)
)
)

Bardens, J.

Plaintiff recovered judgment on a jury verdict in the amount of \$1,000.00 against the defendant for personal injuries and property damage sustained as the result of an intersection collision with defendant's streetcar. Defendant's motions for a directed verdict at the close of all the evidence and for judgment n.o.v. were denied. On appeal from the City Court of Granite City, the defendant urges that the plaintiff was guilty of contributory negligence as a matter of law and that the evidence shows due care and caution on the part of the defendant as a matter of law.

Examining the evidence in its aspects most favorable to the plaintiff in accordance with the well established law controlling the issues as raised by the defendant, we find the following: plaintiff was driving his 1941 Plymouth coupe north on Delmar

Avenue near the intersection of Twenty-third Street in Granite City, Illinois, on the 15th day of February, 1951; the streets were icy and he was driving about 25 miles an hour; as he approached the intersection he slowed down and looking to his left observed defendant's streetcar when it was 20 or 25 feet back from the intersection; he continued to watch the streetcar as he came closer to the intersection and it seemed to slow down to 7, 8 or 10 miles an hour; no signal or warning being given and concluding that the streetcar was coming to a stop, he took his foot off the brake and started on through the intersection; the streetcar suddenly appeared to speed up and struck his automobile from the door back. Plaintiff admits that he could have stopped within five feet. The defendant argues from these facts that the plaintiff's erroneous conclusion that the streetcar was going to stop and his proceeding into the intersection when he could have stopped his automobile and let the streetcar pass in front of him constitute contributory negligence as a matter of law.

What conduct on the part of a plaintiff will be considered to have contributed to his injury and therefore prevent his recovery is a question of fact for the jury. At the point where all reasonable minds must agree, however, that certain conduct constituted contributory negligence, it becomes a question of law. Looking at the evidence and all reasonable inferences therefrom in its light most favorable to the

plaintiff, we are unable to say that all reasonable minds would agree that plaintiff's conduct was a contributing cause of the injury. In *Loftus v. Chicago Ryws. Co.*, 293 Ill. 475, and *Grib v. Chicago Transit Authority*, 343 Ill. App. 263, the court refused to hold as a matter of law that a pedestrian who mistakenly concluded that a streetcar was going to stop and was thereby struck and injured was guilty of contributory negligence. And in *Gnat v. Richardson*, 378 Ill. 626, the Supreme Court concluded that "whether it is negligence to cross a street car track at an intersection ahead of an approaching street car is a question of fact for a jury." The plaintiff's testimony shows that he had his automobile under control, that he was keeping a careful lookout, and that the circumstances indicated that the streetcar was coming to a stop but suddenly speeded up. Under these circumstances it was for the jury to say whether or not the plaintiff had reasonable ground for believing that he could cross in front of the streetcar in safety. On these facts the jury determined that plaintiff's conduct was not lacking in due care and caution.

In considering the contention that the evidence shows no negligence on the part of the defendant as a matter of law, we are not required to weigh all the conflicting evidence and substitute our judgment thereon for that of the jury. Only if the record is barren of any evidence upon which the jury might have based its finding of negligence would we be entitled to hold

the defendant free of negligence as a matter of law. The defendant's motorman testified that he looked to the right when he was 25 feet from the intersection and did not see any traffic; that he looked to the left and did not look back again to the right until he was 4 to 6 feet into the intersection, at which time the conductor warned, "Watch that car." In view of this testimony we cannot say that there was no evidence to support the jury's finding of negligence.

Where there is some evidence upon which a jury might rest its verdict, a reviewing court is not permitted to reject the jury's verdict unless all reasonable minds would agree that the conclusions of the jury find no support in the evidence. The verdict in this case is supported by some competent evidence and the judgment of the trial court will therefore be affirmed.

Judgment affirmed. (Publish abstract only)

Culbertson, P. J., and Scheineman, J., Concur

FILED
FEB 5 1952

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

11

164

45592

A.G. VAN METER,
Appellant,
v.

APPEAL FROM
SUPERIOR COURT

MABEL E. DOWNING, FRANK B. DOWNING,
SOUTHMOOR SECURITIES COMPANY, INC.,
and THE MUTUAL NATIONAL BANK OF
CHICAGO, ILLINOIS,
Appellees.

COOK COUNTY

345 I.A. 605

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for damages against the defendants Mabel E. Downing and Frank B. Downing for breach of an option to buy five parcels of real estate in Chicago, Illinois; and also for damages against the Downings, Southmoor Securities Company, Inc., and the Mutual National Bank of Chicago for conspiracy to bring about the breach of said option. In his original complaint plaintiff alleged that on May 6, 1949, for a valuable consideration, the Downings gave him an exclusive option until September 1, 1949 to purchase the five parcels of real estate; that on July 29, 1949 they sold those parcels to one Howard R. Kyer and thus put it out of their power to comply with the option; and he sought damages of \$20,000.00. By amendment to his complaint plaintiff set forth that he was always ready and willing to perform the option, but he nowhere alleged that he had in any way communicated that readiness to the defendants or that he had accepted or exercised the option. The court held the amended complaint to be insufficient and dismissed the suit. Plaintiff appeals.



With respect to the Downings the question presented is whether plaintiff can base his suit for damages on an option which he never exercised or accepted and where he never advised defendants that he was ready and willing to buy. The authorities are generally in accord that an option is unilateral; it must be exercised or accepted before suit may be brought thereon. An allegation of being ready and willing, without an allegation of communicating that attitude to the seller, is not a statement of the exercise or acceptance of an option. In dealing with this question courts in this state and elsewhere have indicated the distinction that exists between an option and a bilateral contract where each party is already bound.

This distinction is clearly pointed up in Lake Shore Country Club v. Brand, 339 Ill. 504. There the reviewing court reversed ~~the decision of~~ the trial court which had entered a decree in favor of plaintiff for specific performance of an alleged contract for the sale of real estate arising out of an option contract entered into between it and defendants. The court held that an option is unilateral and requires formal acceptance before action may be brought thereon, thus distinguishing it from a bilateral contract. It said: "An option contract is unilateral. Under it the optionee has a right to purchase upon the terms and under the conditions therein named. He is not, however, bound to purchase. Because but one party is bound thereby and the other is not, courts will exercise

their discretion with great care in determining whether such a unilateral contract has been converted into a bilateral contract. (Grandall v. Willig, 166 Ill. 233; Estes v. Furlong, 59 id. 298.) If conditions precedent to the right to convert a unilateral contract into a bilateral one are not met the unilateral contract does not become bilateral. (Barnett v. Meisterling, 327 Ill. 564; Bostwick v. Hess, 80 id. 138.) An option contract is not a contract of sale within any definition of the term, and at best but gives to the option holder a right to purchase upon the terms and conditions, if any, specified in the option agreement. In order to avail himself of the right the optionee must comply with the conditions set out in the option contract. (Bostwick v. Hess, supra; 1 Warvelle on Vendors and Purchasers, --2d ed.--, sec. 175; Jerome v. Setzer, 175 N.C. 391, 95 S.E. 515.) An option contract does not come within the equitable rule against forfeitures. The question of declaring a forfeiture is not involved. An option contract gives to the optionee a right under the named conditions. If those conditions are not met the optionee does not acquire the right. Such a situation involves none of the elements of a forfeiture. It deprives no party of any right and abrogates no contract, but, on the other hand, is but the enforcement of the contract made by the parties. (McCauley v. Coe, 150 Ill. 311; Nelson v. Stephens, 107 Wis. 136, 82 N.W. 163; Briles v. Paulson, 139 Pac. 169.) A court of equity cannot relieve the optionee from the effect of his failure to comply with the conditions on which he has been granted the privilege of buying. This would

make a new contract for the parties and compel the owner to sell when he had not agreed to do so. The optionee must perform all conditions precedent to his right to purchase, not waived by the optionor. In this respect the denial of an option to purchase property differs from the forfeiture of property rights already acquired under a bilateral contract., (James on Option Contracts, (1916) sec. 862.) Therefore, unless the appellee has met the conditions of the option contract or the conditions have been waived it is not entitled to exercise the option."

In Keefer v. United Elec. Coal Cos., 292 Ill. App. 36, which was a suit for damages for breach of a written contract based on defendant's refusal to purchase coal lands, the Appellate Court followed the Lake Shore Country Club decision, stating: "The courts of review of this State have drawn a clear distinction between the two classes of contracts; namely, the unilateral option contract and a ~~bilateral~~ contract for the sale of real estate. This distinction is set forth in apt language by the Supreme Court in the case of Lake Shore Country Club v. Brand, 339 Ill. 504, 521, 171 N.E. 494." After quoting the excerpt from that decision set out above, the Appellate Court added: "An acceptance of an option to purchase must be such a compliance with the conditions as to bind both parties, and if it fails to do so, it binds neither. United States Gypsum Co. v. MacKey Wall Plaster Co. (9 C.C.A.) 252 Fed. 397, 400, 164 C.C.A. 321."

In Hilker v. Curdes, 77 Ind. App. 466, 133 N.E. 851, the court stated that it had been held repeatedly that an

option to sell or purchase real estate was not a contract for sale or purchase, and became such only when the offer contained in the option was accepted. "Until that occurs it constitutes a mere continuing offer, in which the optionee is not bound, and the optioner is only bound to complete the sale or purchase in the event the offer is accepted." See also Clark v. Muirhead, 245 Mich. 49, 222 N.W. 79, to the same effect. The cases upon which plaintiff relies, Hurd v. Denny, 16 Ill. 492, Smith v. Lamb, 26 Ill. 396, and Runkle v. Johnson, 30 Ill. 328, did not involve options but bilateral contracts for the sale of land.

One of the defendants herein, the Mutual National Bank of Chicago, filed a separate brief in which it indicated that it concurred with the position taken by the Downings, but by far the greater part of its brief was devoted to a defense of its action. It contended that the complaint as amended did not allege facts which, if proved, would justify the conclusion that the bank was a participant in a conspiracy. The point is well taken. Plaintiff's charge of conspiracy is founded upon the theory that because all the defendants conspired to and caused the sale of the premises before the option expired, they thereby became liable to plaintiff for damages. We find no allegations in the complaint which would justify the finding that the defendant bank was a participant in the conspiracy, if indeed one existed, or that the purpose of the conspiracy was such that participation therein was itself an actionable tort. In view of our conclusion that defendants had the legal right

-6-

to sell the property notwithstanding the unexercised option, there could be no conspiracy to do an illegal act; and there are no allegations in the amended complaint that any of the defendants conspired to do a legal act in an illegal manner.

For the reasons indicated, we hold that the complaint as amended was substantially insufficient in law and that the court properly dismissed the suit. The judgment of the court is therefore affirmed.

JUDGMENT AFFIRMED.

Burke, P.J., and Niemeyer, J., Concur.

45574

In the Matter of The Estate of
ELI HERMAN, Deceased.

SIMPSON CREEK COAL SALES COR-
PORATION,
Claimant-Appellee,

v.

MOLLIE PURZE, Administratrix
of the Estate of ELI HERMAN,
Deceased,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

345 I.A. 606¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant, administratrix, appeals from an order of the Circuit court of Cook county allowing the claim of the Simpson Creek Coal Sales Corporation, hereinafter referred to as claimant, against the estate of Eli Herman, deceased, in the sum of \$4,059.94 for coal ordered on a guaranty of decedent of claimant's bills to the Great Eastern Coal Sales Corporation, of which he was president.

Claimant is the sales agent of the Simpson Creek Collieries Company, a producer of coal from mines in West Virginia. The two companies occupy the same offices in New York City. The Great Eastern Coal Sales Corporation was a new company, without credit standing. Under date of February 24, 1949 decedent wrote claimant as follows: "In connection with our projected business transaction for the purchase and sale of coal of the Simpson Creek Collieries, I wish to inform you that being the head of the Great Eastern Coal Sales Corporation, *** I am personally interested in

-2-

seeing that the credit extended to us by your company shall be used with the greatest discretion, and I personally guarantee that the bills submitted will be paid on their due dates."

On the same day decedent's company sent two orders, addressed to the Collieries company, each for a carload of coal, and another order to claimant for one car of coal. On March 3, 1949 it sent an order for three cars to the Collieries company, and under date of April 5, 1949 an order to claimant for ten cars of coal. This coal was shipped to decedent's company and in each instance the purchaser was billed by claimant, reference on the invoice being made to purchaser's order number. On April 22, 1949 the attorney for the administratrix of the estate of the decedent wrote Mr. J. C. Meyer, sales manager of claimant, care of the Collieries company, advising him of the death of decedent and stating that no further shipments of coal should be made "upon the strength of any guarantee which might have been signed by Mr. Herman."

The defense interposed to the claim is wholly technical. It is first objected that the letter quoted above did not constitute a guaranty. The language is plain and unequivocal. By the letter decedent guaranteed payment of bills rendered by claimant for shipments of coal from the mine of the Collieries company. The second objection is, that the coal, being mined and shipped by the Collieries company, claim should have been made by it rather than claimant. So far as the record shows, all coal shipped was accepted by decedent's principal. It was all billed by claimant. No objection was made by the purchaser as to the right of claimant to render invoices.

-3-

Purchaser gave an order (No. 1004) which is not in the record.. Its order 1005 was addressed to the Collieries company. By telegram to claimant, purchaser canceled order 1004 and directed that the car be applied on order 1005. The record shows a careless and indiscriminate use of the names of claimant and the Collieries company in the correspondence between the parties. No injury was suffered by reason of this. Decedent's company got the coal on decedent's guaranty. Objections to the claim are without merit.

The order is affirmed.

ORDER AFFIRMED.

BURKE, P. J., and FRIEND, J., Concur.

45599

MARY BASILE, Administrator of the
Estate of Daniel Basile, Deceased,

Appellant,

v.

HARRY ZEID,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

345 I.A. 806²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, administratrix of the estate of her deceased husband, appeals from a judgment for defendant entered on a directed verdict in her action for the wrongful death of her intestate.

The accident on which this action is based occurred May 17, 1948, at the intersection of Keeler avenue, a north and south street, and Fillmore street, an east and west street, in Chicago. The only testimony in the record as to how the accident occurred is the testimony of the defendant, called by plaintiff for cross-examination. He testified that he left his home about 7:45 a.m. with his daughter, whom he was taking to the "L" station at 5th Avenue and Crawford; he entered Keeler avenue south of 12th street and was driving north; he approached the intersection of Keeler avenue and Fillmore street driving at about 20 miles an hour; there is a stop sign on the north side of Fillmore street and east of Keeler; he did not see plaintiff's intestate. Other evidence shows that the latter was driving west on Fillmore street in a motorette. Defendant says that plaintiff's intestate ran

-2-

into the right rear fender of his car; that he, the witness, stopped immediately--within about 10 feet; the motorette was lying on Fillmore street near Keeler. Photographs in evidence show damage on the rear of the scooter. Defendant offered no testimony. He submitted a written motion reciting that at the close of all the evidence offered by plaintiff and defendant, he moved that the court exclude the evidence and instruct the jury to find the defendant not guilty. Plaintiff filed a motion for judgment notwithstanding the verdict and an alternative motion for a new trial. Both were denied. There is no evidence of the conduct of plaintiff's intestate at or immediately before the collision. The burden rested on plaintiff to prove affirmatively the exercise of due care by the intestate. Prill v. City of Chicago, 317 Ill. App. 202. No presumption of negligence of the defendant or of due care on the part of plaintiff's intestate arises from the mere fact that the collision occurred. The court therefore properly directed a verdict for defendant. Prill v. City of Chicago, supra.

Objection is made that no written instruction directing the verdict was given to the jury. This point is raised for the first time in this court. It was not included in the written motion for judgment notwithstanding the verdict or in the motion for new trial. If there be any merit in the objection, it was waived by plaintiff.

The judgment is affirmed.

AFFIRMED.

Burke, P.J., and Friend, J., concur.

A 167

345 I.A. 607¹

45627

DR. BENJAMIN GASUL,
Appellee,
v.
MICHIGAN MUTUAL LIABILITY
COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$125 entered against it on an automobile liability insurance policy.

The provision of the policy on which the judgment is based reads as follows:

"Coverage C--Medical Payments
To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission."

It is stipulated that while the policy was in force plaintiff's wife sustained an automobile accident and received some bodily injuries. The claim of plaintiff is for \$125 paid a dentist for services in repairing a porcelain bridge which was in the mouth of the wife of the plaintiff at and before the time of the accident. The sole question presented is whether or not the dental services in repairing the bridge is covered by the provision of the policy quoted above. Defendant contends that dental services are

-2-

separate and distinct from medical or surgical services mentioned in the policy; that there is no ambiguity in the policy, and recovery should be denied. No case directly in point has been brought to our attention. Plaintiff cites Black's Law Dictionary, defining dentistry as a special department of medical science dealing with the treatment of the diseases, etc., of human teeth; 21 R. C. L. 352, stating: "Technically a surgeon is a person healing by means of manual operations, a dentist one practicing surgery on the teeth." Statements to like effect are found in 18 C. J. 487, and State v. Beck, 21 R. I. 288. Under these authorities dentistry is a subdivision of surgery. The provision of the policy was evidently intended to cover all reasonable expenses for services in the diagnosis and alleviation of bodily ills sustained by accident while the person injured is in the automobile. No valid reason can exist for excluding injuries to the teeth. Technical objection that, the bridge being removable, any damage to it is damage to property, draws an unnecessarily fine distinction. Whenever there is reason for construction of an insurance policy, it is construed most strongly in favor of the insured, Marshall v. Metropolitan Life Ins. Co., 405 Ill. 90.

The judgment is affirmed.

AFFIRMED.

Burke, P.J., and Friend, J., concur.

45658) Consolidated.
45659)

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
v.
ROBERT D. ELDER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO

345 I.A. 607²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from two judgments of conviction of the crime of contributing to the delinquency of a minor child, in which he was sentenced to the county jail for the term of 60 days, the sentences to run concurrently.

The two convictions grew out of the same act, charged to have been committed June 17, 1948. During the pendency of the cases the State's Attorney filed a petition July 13, 1948 under paragraphs 320-325, chapter 38, Illinois Revised Statutes. July 29, 1948 the jury found the defendant was a criminal sexual psychopathic person. Judgment was entered on the verdict and defendant committed to the custody of the Department of Public Safety to be confined in the psychopathic division of the Illinois State Penitentiary at Menard. The criminal cases were continued generally. On April 10, 1951, on proceedings had under the statute, a jury found that the defendant had fully recovered from his sexual psychopathy and was not a criminal sexual psychopathic person. Thereafter, on a trial of the criminal cases, defendant was found guilty in each case and sentenced, as above stated. No question is raised as to the sufficiency of the evidence to sustain the

charge. The only ground for reversal urged by defendant is that under the statute relating to criminal sexual psychopathic persons, defendant could not be tried for the offenses charged after having been found to be a person of that character and committed to the custody of the Department of Public Safety, because the statute provides that the mental disorder must exist for a period of not less than one year immediately prior to the filing of the petition before such commitment can be had. This contention ignores the provisions of section 6 of the act (paragraph 825), which provides that upon discharge of such person as having fully recovered from such psychopathy, the court shall order him committed to the custody of the sheriff of the county from which he was committed, to stand trial for the criminal offense charged against him. In commenting on this statute in People v. Redlich, 402 Ill. 270, the court said:

"The object of the legislature in providing for the proceeding, as clearly appears from the statute in question, was to prevent a person afflicted with such mental disorder from being tried for a criminal offense until he had recovered from such psychopathy."

Undoubtedly the legislature had a further purpose in mind-- the protection of the public from the evil and depraved tendencies of such persons by committing them to an institution. The trial court did not err in entering judgments and sentencing defendant. Judgments affirmed.

AFFIRMED.

Burke, P.J., and Friend, J., Concur.

0 R.
miff

2702
H

Abstract

General No. 10538

Agenda No. 32

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

345 I.A. 608

October Term, A.D. 1951

MARIE J. KLEINSCHMIDT,
Plaintiff-Appellee,
vs.

EDWARD E. KLEINSCHMIDT,
KLEINSCHMIDT LABORATORIES,
INC., a corporation, et al.,
Defendants.

Appeal from the
Circuit Court of
Lake County, Illinois.

EDWARD E. KLEINSCHMIDT,
Defendant-Appellant.

Dove, P.J.

On May 26, 1950, Marie J. Kleinschmidt filed in the Circuit Court of Lake County a very voluminous complaint against her husband, Edward E. Kleinschmidt, Kleinschmidt Laboratories, Inc., Continental Illinois National Bank and Trust Company of Chicago, Highland Park National Bank, American Telephone and Telegraph Company, Alfred W. Mansfield, Alfred W. Mansfield, Jr., James A. Prindiville, and William E. Ferguson.

March 10, 1932

General No. 10232

IN THE

COURT OF COMMONS

808 A. 1318

THE COURT

March 10, 1932

MARIE J. KLEINOWITZ

Plaintiff-Appellee

vs.

EDWARD E. KLEINOWITZ

Defendant-Appellant

Settlement

EDWARD E. KLEINOWITZ

Settlement-Appellant

Edward E. Kleinowitz
Circuit Court of
Lake County, Illinois

Love, F. J.

On May 26, 1931, Marie J. Kleinowitz filed in

the Circuit Court of Lake County a very voluminous complaint

against her husband, Edward E. Kleinowitz, who was then

Laboratories, Inc., Continental Illinois National Bank and

Trust Company of Chicago, Chicago, Illinois, and others.

Her complaint was captioned "Alfred E. Klenowitz, Jr., James E. Klenowitz, and William E.

Ferguson.

Among other things, the complaint alleged that the plaintiff and defendant, Edward E. Kleinschmidt, were residents of Lake County, Illinois, and were married on September 25, 1937, and lived and cohabited together as husband and wife until August 3, 1949, except for a four and one-half month separation in 1939. The complaint then charged that on August 3, 1949, Edward E. Kleinschmidt voluntarily and unjustifiably deserted the plaintiff without cause and against her wishes, and on November 14, 1949, filed a bill for divorce against her in the Circuit Court of Dade County, Florida. The complaint then charged that between June 7, 1949, and August 3, 1949, her husband became offensive in his habits about the home, repeatedly performed acts which caused the plaintiff embarrassment and had been guilty of extreme and repeated cruelty on numerous occasions. She particularly charged that on December 2, 1939, the defendant choked her with such force and pain that she momentarily lost consciousness; that during the month of February, 1948, he became infuriated and angry and while plaintiff was asleep, he choked her; that during the month of February, 1949, he over-indulged in intoxicating liquors and purposely broke cocktail glasses on the kitchen floor of their home, permitting the pieces of glass to remain there with intent to injure the plaintiff, knowing that the plaintiff was in the habit of coming down to the kitchen in the morning with her feet bare. It was also alleged that in July, 1949, during the nighttime, her husband choked her with both hands, threw a cocktail glass toward the kitchen sink where she was in the process of preparing food

Among other things, the complaint alleged that the plaintiff and defendant, Edward E. Kleinschmidt, were residents of Lake County, Illinois, and were married on September 25, 1937, and lived and cohabited together as husband and wife until August 3, 1949, except for a four and one-half month separation in 1939. The complaint then charged that on August 3, 1949, Edward E. Kleinschmidt voluntarily and unjustifiably deserted the plaintiff without cause and against her wishes, and on November 14, 1949, filed a bill for divorce against her in the Circuit Court of Lake County, Florida. The complaint then charged that between June 7, 1949, and August 3, 1949, her husband became offensive in his habits about the home, repeatedly performed acts which caused the plaintiff embarrassment and had been guilty of extreme and repeated cruelty on numerous occasions. She particularly charged that on December 2, 1939, the defendant choked her with such force and pain that she momentarily lost consciousness; that during the month of February, 1948, he became infuriated and angry and while plaintiff was asleep, he choked her; that during the month of February, 1949, he over-indulged in intoxicating liquors and purposely broke cocktail glasses on the kitchen floor of their home, permitting the pieces of glass to remain there with intent to injure the plaintiff, knowing that the plaintiff was in the habit of coming down to the kitchen in the morning with her feet bare. It was also alleged that in July, 1949, during the nighttime, her husband choked her with both hands, threw a cocktail glass toward the kitchen sink where she was in the process of preparing food

for dinner and that the glass broke into many pieces and parts thereof glanced up and hit the plaintiff near her eyes with such force as to necessitate an examination by a specialist. The complaint also alleged that on September 3, 1949, the date of her father's death, her husband was drinking heavily and without warning he thrust his fists between her breasts, causing her great pain and discomfort. The complaint prayed for a divorce or, in the alternative, for separate maintenance. It also prayed for specific performance of an invention assignment agreement, the cancellation of a deed, and for damages, alimony, suit money and attorney fees.

On August 4, 1950, the plaintiff filed her petition in the lower court, praying that her defendant husband be restrained from prosecuting his action for divorce in Florida and also for temporary alimony and attorney fees. A hearing was had and on September 6, 1950, an order was entered restraining the husband from prosecuting his divorce action in the Florida court. Upon appeal, this court reversed that order. (Kleinschmidt v. Kleinschmidt, 343 Ill. App. 539). On September 5, 1950, an order was entered by the Florida court in the divorce proceeding instituted there by Mr. Kleinschmidt restraining the plaintiff in this case from further proceeding with this cause. Thereafter and on March 10, 1951, plaintiff filed a renewal petition for alimony and solicitor fees pendente lite in which she alleged, among other things, that she is engaged in litigation with her husband in seven proceedings and in four jurisdictions; that she has no resources with which to fight her husband; that the home of the parties in

for dinner and that the glass broke into many pieces and parts thereof glanced up and hit the plaintiff near her eyes with such force as to necessitate an examination by a specialist. The complaint also alleged that on September 3, 1949, the date of her father's death, her husband was drinking heavily and without warning he thrust his fists between her breasts, causing her great pain and discomfort. The complaint prayed for a divorce or, in the alternative, for separate maintenance. It also prayed for specific performance of an invention assignment agreement, the cancellation of a deed, and for damages, alimony, suit money and attorney fees.

On August 4, 1950, the plaintiff filed her petition in the lower court, praying that her defendant husband be restrained from prosecuting his action for divorce in Florida and also for temporary alimony and attorney fees. A hearing was had and on September 6, 1950, an order was entered restraining the husband from prosecuting his divorce action in the Florida court. Upon appeal, this court reversed that order. (Kleinschmidt v. Kleinschmidt, 343 Ill. App. 533). On September 5, 1950, an order was entered by the Florida court in the divorce proceeding instituted there by Mr. Kleinschmidt restraining the plaintiff in this case from further proceeding with this cause. Thereafter and on March 10, 1951, plaintiff filed a renewal petition for alimony and solicitor fees pendente lite in which she alleged, among other things, that she is engaged in litigation with her husband in seven proceedings and in four jurisdictions; that she has no resources with which to fight her husband; that the home of the parties in

Highland Park is a palatial dwelling worth in excess of \$100,000.00; and that the defendant is a man of great wealth with an income in excess of \$75,000.00. To this petition her defendant husband filed his motion to strike, or in the alternate, to stay this proceeding setting up the restraining order issued by the Florida court in the divorce proceedings between these parties there pending. Upon a hearing, this motion was denied and an order was entered finding "that the individual defendant, Edward E. Kleinschmidt, during the year 1948 had a gross income of \$77,819.00 and an income of more than \$59,000.00 for the year 1949; that the parties plaintiff and the individual defendant were accustomed to an exceptionally high standard of living from the date of their marriage on September 25, 1937 to the date the parties separated on August 3, 1949, and it appearing further to the court that the plaintiff has been required to defend an appeal from an interlocutory injunction of this court entered herein on September 6, 1950, against the defendant, Edward E. Kleinschmidt and that she has otherwise been required to pay substantial attorney fees, it is ordered and adjudged that the motions of the defendant, Edward E. Kleinschmidt, to strike the plaintiff's petitions or in the alternate to stay the proceedings herein should be and are hereby denied." The court then directed the defendant to pay to the plaintiff \$500.00 per month beginning April 1, 1951, and the further sum of \$3000.00 for counsel fees and expenses. To reverse this order Edward E. Kleinschmidt appeals.

The controlling considerations in determining whether alimony pendente lite and suit money should be allowed a wife

Highland Park is a palatial dwelling worth in excess of \$100,000.00; and that the defendant is a man of great wealth with an income in excess of \$75,000.00. To this petition not defendant husband filed his motion to strike, or in the alternative, to stay this proceeding setting up the restraining order issued by the Florida court in the divorce proceedings between these parties there pending. Upon a hearing, this motion was denied and an order was entered finding "that the individual defendant, Edward E. Kleinschmidt, during the year 1948 had a gross income of \$7,819.00 and an income of more than \$5,000.00 for the year 1949; that the parties plaintiff and the individual defendant were accustomed to an exceptionally high standard of living from the date of their marriage on September 25, 1937 to the date the parties separated on August 3, 1949, and it appearing further to the court that the plaintiff has been required to defend an appeal from an interlocutory injunction of this court entered herein on September 6, 1950, against the defendant, Edward E. Kleinschmidt and that the defendant otherwise been required to pay substantial attorney fees, it is ordered and adjudged that the motions of the defendant, Edward E. Kleinschmidt, to strike the plaintiff's petition or in the alternative to stay the proceedings herein should be and are hereby denied." The court then directed the defendant to pay to the plaintiff \$500.00 per month beginning April 1, 1951, and the further sum of \$800.00 for counsel fees and expenses. To reverse this order Edward E. Kleinschmidt appeals.

The controlling considerations in determining whether alimony pendente lite and suit money should be allowed a wife

in a divorce proceeding are (1) whether there was probable cause for instituting the suit, (2) the wife's necessity, and (3) the husband's ability to pay. (Burgess v. Burgess, 25 Ill. App. 525,6).

Counsel for appellant insist that appellee is vindictive and guilty of bad faith in instituting this proceeding six months after her husband had instituted his suit for divorce against her in the Circuit Court of Dade County, Florida. In this connection, counsel call our attention to the fact, as disclosed by this record, that appellee entered her appearance in the proceeding in Florida and after the trial court had ruled that it had jurisdiction of the parties and had enjoined the prosecution of this suit in Illinois, she sought, unsuccessfully, to have those orders of the Circuit Court of Dade County, Florida, reversed by the Supreme Court of Florida.

In reversing the order of the trial court in this proceeding, which enjoined appellant here from prosecuting his suit in the Florida court, this court said ^(Kleinschmidt v. Kleinschmidt, 343 Ill. App. 539, 5-5-1): "It is clear that defendant did not endeavor to establish a Florida residence for the purpose of instituting divorce proceedings and that his residence ^{there} was bona fide and legitimately acquired. . . . It was not the defendant who left the State to avoid pending divorce proceedings but it was the plaintiff who had been residing with defendant in Florida who left him shortly before he filed suit for divorce and then did not commence her retaliatory action in Illinois until some six months later. Under the

in a divorce proceeding are (1) whether there are probable
causes for instituting the suit, (2) the wife's domicile, and
(3) the husband's ability to pay. (Puryear v. Puryear, 111
Ill. App. 521, 522.)

Consequently, the defendant insists that she is a res-
ident and holder of her title in Illinois and therefore
the six months after her husband has instituted his suit for
divorce against her in the Illinois Court of Cook County, Illinois.
In this connection, counsel calls our attention to the fact, as
stated by this record, that appellee entered her appearance
in the proceeding in Illinois and after the trial court had
ruled that it had jurisdiction of the parties and the subject-
matter of this suit in Illinois, she sought, and was
granted, to have those orders of the Circuit Court of Cook County,
Illinois, reversed by the Supreme Court of Illinois.

In reversing the order of the trial court in this
proceeding, which enjoined appellant from proceeding in his
suit in the Illinois Court, this court said: "It is clear that
defendant did not endeavor to establish a Florida domicile for
the purpose of instituting divorce proceedings, and that his
residence was bona fide and legitimately acquired. . . . It was
not the defendant who left the State to avoid pending divorce
proceedings. . . . but it was the plaintiff who had been
left with defendant in Illinois and left his domicile before he
filed suit for divorce and then did not coalesce with plaintiff
action in Illinois until some six months later. Under the

foregoing circumstances the evidence was clearly insufficient to warrant the issuance of the injunction by the Circuit Court herein."

The record here discloses that in 1939 a post-nuptial agreement was entered into between appellant and appellee, and pursuant to its provisions appellee acquired from appellant five hundred shares of stock in American Telephone and Telegraph Company, having a value of more than \$75,000.00 and from which appellee receives in dividends \$4,500.00 per year.

The statute provides that the court in which a divorce proceeding is pending may require the husband to pay his wife or into court for her use during the pendency of the suit such sums of money as may enable her to maintain her suit and in every suit when it is just and equitable, the wife shall be entitled to alimony during the pendency of the suit. It is also provided that the court may, in its discretion, reserve the question of the allowance of attorney fees and suit money until the final hearing of the case and may then make such order with reference thereto as may seem just and equitable regardless of the final disposition of the case. (Ill. Rev. Stat. 1949, Chap. 40, sec. 16). In view of the fact that this proceeding was not commenced until after the Florida court in the divorce proceeding instituted by appellant had ruled adversely to appellee's contention challenging the jurisdiction of that court and had enjoined appellee from further prosecuting this action, and in view of the fact that appellee is financially able to live as she has been accustomed to live and has adequate means of her own with which to finance her own litigation, we believe it would

foregoing circumstances the evidence was clearly insufficient to warrant the issuance of the injunction by the Circuit Court herein."

The record here discloses that in 1938 a post-nuptial agreement was entered into between appellant and appellee, and pursuant to its provisions appellee acquired from appellant five hundred shares of stock in American Telephone and Telegraph Company, having a value of more than \$75,000.00 and from which appellee receives in dividends \$4,500.00 per year.

The statute provides that the court in which a divorce proceeding is pending may require the husband to pay his wife or into court for her use during the pendency of the suit such sums of money as may enable her to maintain her suit and in every suit when it is just and equitable, the wife shall be entitled to alimony during the pendency of the suit. It is also provided that the court may, in its discretion, reserve the question of the allowance of attorney fees and suit money until the final hearing of the case and may then make such order with reference thereto as may seem just and equitable regardless of the final disposition of the case. (Ill. Rev. Stat. 1949, Chap. 40, sec. 15). In view of the fact that this proceeding was not commenced until after the Florida court in the divorce proceeding instituted by appellant had ruled adversely to appellee's contention challenging the jurisdiction of that court and had enjoined appellee from further prosecuting this action, and in view of the fact that appellee is financially able to live as she has been accustomed to live and has adequate means of her own with which to finance her own litigation, we believe it would

be more in harmony with the letter and spirit of our laws if the trial court had reserved the question of the allowance of attorney fees and suit money until the final hearing of this case upon its merits.

We recognize that ordinarily an appellate court would not be justified in reversing the order of the trial court upon a matter of this character. Whether any amount should be allowed and the amount to be allowed and the time when such allowances should be made are matters addressed to the sound, legal, discretion of the chancellor, but such discretion is subject to review. (Klekamp v. Klekamp, 275 Ill. 98, 107; 17 Am. Jur. 449, sec. 566.) In view of all the circumstances and facts disclosed by this record, we believe it was not just and equitable to allow appellee alimony during the pendency of this suit and that the allowance for attorney fees and suit money should be reserved until the final hearing of the merits of this case.

The order appealed from is therefore reversed with directions to the lower court to reserve the question of the allowance of attorney fees and suit money until the hearing of the case.

Order reversed with directions.

the court in harmony with the letter and spirit of our laws if the trial court had not made the question of the allowance of attorney fees and suit money until the final finding of this case upon the merits.

...and I will not be able to do so.

45582

STANLEY BOLMAN,

Appellee,

v.

THOMAS HARDY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

345 I.A. 609¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In a forcible entry and detainer proceeding, plaintiff, on January 23, 1951, had judgment for possession of an apartment in a building located at 5610 Prairie avenue in Chicago. The order entered by the court provided that the writ of restitution be stayed for ninety days, and gave plaintiff leave to accept rent for the use and occupancy of the premises during that period, without prejudice. Thereafter, on February 15, 1951, plaintiff moved to accelerate the issuance of the writ, whereupon the court vacated the order of January 23 and directed that the writ of restitution issue in five days. Pursuant to that order, plaintiff could have had possession of the apartment after the five-day period; instead, he waited until April 23, 1951, more than two months, before he caused the writ to issue, and in the interim he allowed plaintiff to occupy the premises and accepted rent therefor. May 1, 1951 defendant filed a petition in the nature of a writ of audita querela, wherein he set forth the proceedings already had and the orders already entered, and alleged that since February 23, 1951, and each and every succeeding Friday through and including April 13, 1951, plaintiff had accepted from defendant the sum of \$11.30 per

week in advance as rental for the premises, and permitted him to continue to occupy the premises; that in consequence thereof a new tenancy was created, as a result of which plaintiff had divested himself of any right to proceed further in the pending suit; and defendant asked for the entry of an order quashing the writ of restitution previously issued, and permanently enjoining and staying plaintiff from procuring the issuance of any other writ of restitution. The court denied the petition, and defendant appeals. Plaintiff has filed no brief in support of the order from which the appeal is taken.

The rule is well settled that a petition in the nature of a writ of audita querela affords relief against a judgment or execution because of some defense or discharge arising subsequent to rendition of the judgment. A similar situation arose in Di Paola v. Seppala, 336 Ill. App. 344. Trial by the court without a jury resulted in a judgment of restitution, and the order, as in the case at bar, provided that the writ be stayed for ninety days, during which plaintiff had leave to accept rent for use and occupancy during that period, without prejudice. The court held that after judgment of restitution the parties might, if they chose, again enter into the relationship of landlord and tenant; and that where it is sought, under a writ of restitution, to evict a tenant who maintains that the writ cannot be enforced because a new tenancy has arisen subsequent to the entry of the judgment, the tenant may obtain relief by filing a petition in the nature of a writ of audita querela which is in the nature of a new action.

The allegations of the petition in this proceeding must be taken as true. By reason of the occupancy and payment of weekly rental after the order of February 15, 1951, the law created a new tenancy. (Sebastian v. Hill, 51 Ill. App. 272; Sprengel v. Schroeder, 203 Ill. App. 213); plaintiff recognized defendant as his tenant at a time when he was entitled immediately to evict him from the premises, and by accepting rent for a considerable period thereafter he lost the right to enforce the judgment of restitution previously entered in his favor. Accordingly, the court should have allowed defendant's petition. The order of May 1, 1951 is therefore reversed, and the cause is remanded with instructions to sustain the petition, to quash the writ of restitution, and to enjoin plaintiff from procuring the issuance of another writ in this proceeding.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Burke, P. J., and Niemeyer, J., Concur.

172

A

45690

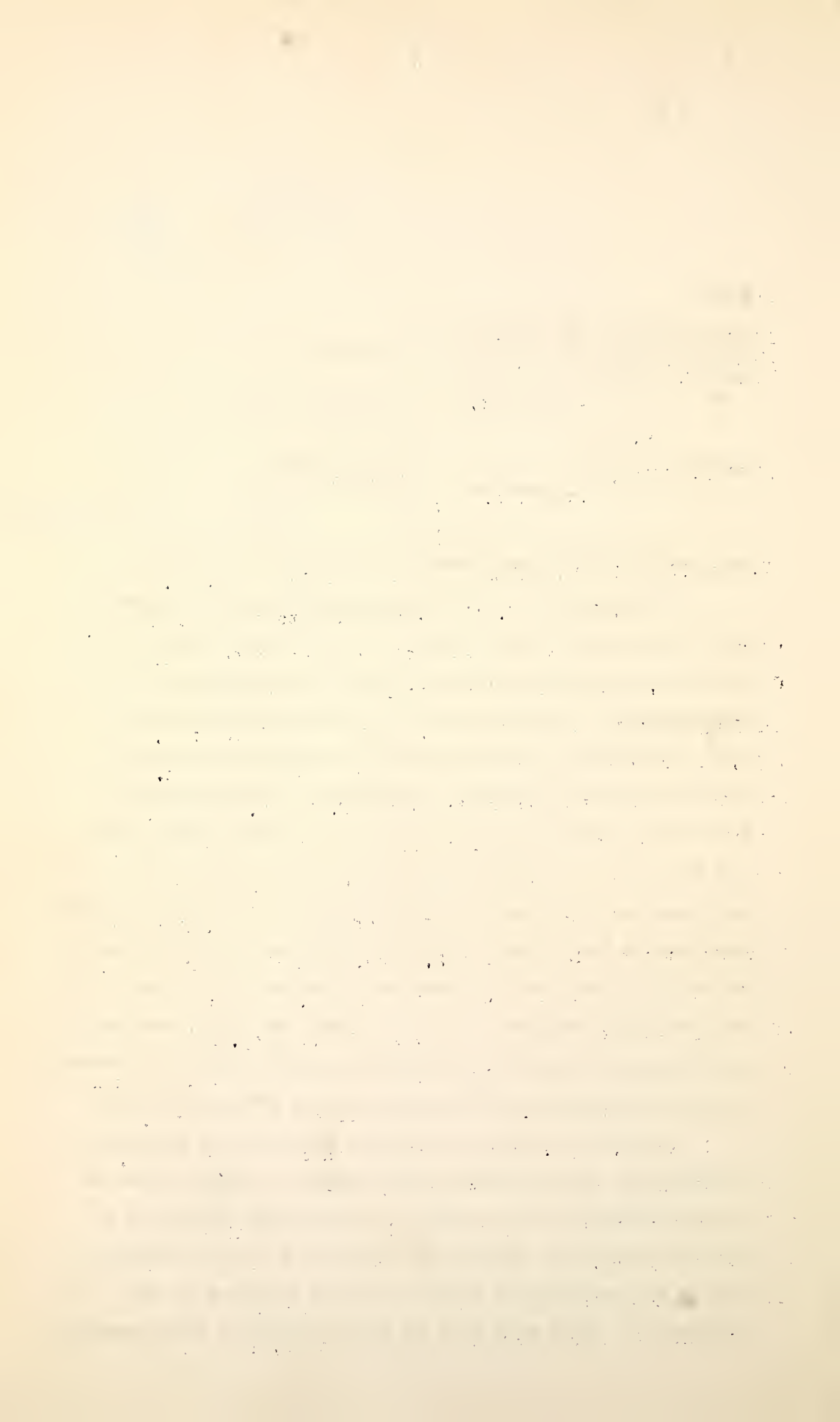
THE PEOPLE OF THE STATE OF)	
ILLINOIS upon the relation of	)	APPEAL FROM
LESLIE J. SMITH,)	
Appellant,	)	CIRCUIT COURT,
v.)	
MYRON E. WISCH,	)	COOK COUNTY
Appellee.)	

345 I.A. 809²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Relator, Leslie J. Smith, appealed to the Supreme Court of Illinois from an order of the Circuit Court of Cook County, denying him leave to file a complaint in quo warranto; the Supreme Court, by order of October 5, 1951, transferred the cause to this court for decision. From the record it appears that Myron E. Wisch, attorney for the Village of Elmwood Park for more than twenty years, was from time to time re-appointed to his office by the president and the board of trustees of the village. His last appointment took place on May 2, 1949, upon the joint action of the president and the board of trustees, for a term of four years from May 1, 1949 to April 30, 1953, and until his successor should be duly appointed and qualified. Pursuant to that appointment he filed his oath of office and bond.

On May 7, 1951, over the objection of the president, a resolution was presented which sought to remove Wisch as village attorney and to appoint in his stead Smith for a term of two years, conditioned upon his filing an oath of office and executing a bond in the sum required by the resolution. Upon roll call on the resolution, four trustees



-2-

voted in favor of its adoption and two against. The president immediately vetoed the resolution on the ground that the attempted removal and appointment were not presented and passed with his approval and concurrence, as provided by section 9--84 of the Cities and Villages Act (Ill. Rev. Stat. 1951, ch. 24, sec. 9--84, enacted in 1941, to become effective January 1, 1942) and by the ordinances of the Village of Elmwood Park. The president's action was overridden by the same number of votes--four to two. Thereafter, on May 10, 1951, Smith filed his oath of office, but did not file his bond, as provided in the resolution of May 7 and as required by the statute (Cities and Villages Act, sec. 9-89). On June 6, 1951 Smith presented his petition for leave to file his quo warranto complaint. The court entered a rule nisi against Wisch, returnable June 19, to show cause, if any, why Smith should not be given leave to file it. On June 15, 1951 Wisch filed his return to the rule, stating that the statute relating to the appointment of certain village officers had been amended in 1941 and changed the power of appointment of such officers from the president and the board of trustees under the prior act (Ill. Rev. Stat. 1939, ch. 24, par. 152, sec. 11 of art. XI) to the president and the board of trustees "voting jointly"; that the attempted removal of the incumbent and the appointment of a successor, without the approval and concurrence of the village president, was in contravention of the statute and the village ordinances; that Smith had filed only his oath of office but not his bond, as required by

-3-

the resolution of May 7, 1951 and by statute. Subsequently, on June 22, 1951, Smith filed his traverse to the return of the rule, setting forth that on June 18, 1951 a second resolution had been presented for the consideration of the president and the board of trustees to correct the errors and the deficiencies contained in the previous resolution of May 7, which changed Smith's term of appointment from two years to one year, and deleted all provisions pertaining to the filing of a bond; that the amended resolution, over the objections of the president, again resulted in a vote of four to two; that the president vetoed the second resolution, assigning the same reasons; and that his action was again overridden by a veto of four to two.

On June 26, 1951 Wisch filed his reply to the traverse, averring that since the second resolution and all proceedings pertaining thereto were had subsequent to the filing of the petition for leave to file the quo warranto complaint, they in nowise affected his continuance in office. On the same day the court entered the order denying Smith leave to file his complaint.

Smith claims that he has shown a clear right to the office and that upon the record presented the court should have entered a judgment of ouster against Wisch; that he (Smith) was lawfully appointed village attorney; that the veto of the resolutions appointing him was ineffective; and that he was properly qualified for office. Section 9--84 of the statute which was in force and effect at the time of Wisch's last appointment reads as follows: "The president

and board of trustees, voting jointly, may appoint (1) a treasurer; (2) one or more street commissioners; (3) a village marshal; and (4) such other officers as may be necessary to carry into effect the powers conferred upon villages. The president and board of trustees may prescribe the duties and fees of these officers, and may require them to execute whatever bonds are prescribed by ordinance. * * * If there is a failure to elect or appoint a village officer, or the person elected or appointed fails to qualify, the person filling the office shall continue in office until his successor has been chosen and has qualified."

This statute is substantially the same as the act in force before 1941 except that the words "voting jointly" were added, together with a provision that the incumbent in office should continue "until his successor has been chosen and has qualified." The courts, in construing the statute prior to the adoption of the amendments in 1941, held that the power of appointment was vested in the board of trustees, and that the president merely had one vote, the same as any other member of the board. Smith cites numerous cases interpreting the old statute, but in substantially all of them the courts emphasized the fact that they were construing the act then in force, and of necessity made no interpretation of the phrase "voting jointly." There are no cases interpreting the amended statute. Whether the change in phraseology effected by inserting the words "voting jointly" indicates an intention to change the law as it formerly existed, or whether the amendment merely enacted in statutory

form what the courts had previously held, as Smith contends, is not at all clear; but, in the view we take it is unnecessary to interpret this phrase. In The People v. France, 314 Ill. 51, the court prescribed the procedure to be followed where there is a petition for leave to file an information in the nature of quo warranto. If the petition shows a prima facie cause for filing the information, the court may act upon the petition or enter a rule nisi upon the respondents to show cause why it should not be filed; granting or withholding leave to file then rests in the sound discretion of the court to which the application is made. In the instant case Wisch was appointed upon the joint action of the president and the board for a term of four years on May 2, 1949, making the termination date April 30, 1953. The appointment provided that he should hold office until his successor was duly appointed and qualified. In the original resolution of May 7, 1951 an attempt was made to remove Wisch and substitute Smith in his place and stead for a term of two years, conditioned upon his filing his oath of office and executing a bond. He did file his oath of office but did not execute his bond, as provided in the resolution and as required by section 9--89 of the statute. On that state of the record he had not qualified for the office, and Wisch, the incumbent, held over. Smith's traverse to the return of the rule shows that pursuant to the second resolution, which was intended to correct the errors and deficiencies of the first, the appointment was changed from a period of two years to one year, and all provisions

-6-

with respect to the filing of a bond were deleted; the statute, however, requires a bond, and therefore, Smith's alleged appointment under the second resolution could not have become effective unless and until he filed his bond. Moreover, all proceedings with respect to the second resolution were had subsequent to the filing of the petition for leave to file the quo warranto complaint. Matters which occur after the filing of a petition for leave to file a complaint in quo warranto cannot properly be pleaded or considered. Town of Kaneville v. Meredith, 361 Ill. 556; Baker v. Salzenstein, 314 Ill. 226; Darmstadt v. Horwitz, 298 Ill. App. 523. The court was fully justified, as of the time Smith filed his petition, in holding that he had no clear right to the office, and in exercising its discretion to deny him leave to file the petition. The People v. France, *supra*; The People v. Burson, 307 Ill. 533.

Upon the record presented we think the order of the Circuit Court should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Burke, P.J., and Niemeyer, J., Concur.

A
170

45644

THE PEOPLE OF THE STATE OF
ILLINOIS,

Appellee,

v.

EDWARD BROWN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

345 1.A. 610¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment finding him guilty of petit larceny of one and one-half pounds of butter of the value of \$1.69, from an order striking his petition to vacate said judgment, and from a further order refusing to vacate the last mentioned order.

The judgment was entered January 30, 1950. Defendant was immediately placed on probation for a period of 30 days. After the probation had expired, defendant moved to vacate the judgment, alleging that he was unfamiliar with court proceedings, did not have an opportunity to procure a lawyer to defend him, that the complaint on which he was tried was insufficient, and the evidence offered did not sustain the judgment. No report of proceedings of the trial is before us. On April 25th defendant's petition to vacate the judgment was stricken, and on June 5, 1951 his motion to vacate the order of April 25, 1951 was denied. The judgment having been fully executed, the questions raised on the appeal are moot. Furthermore in People v. Collis, 344 Ill. App. 539, we held that a defendant who has been released on probation cannot appeal from the judgment.

For these reasons the appeal is dismissed.

APPEAL DISMISSED.

BURKE, P. J., and FRIEND, J., Concur.

171 A

45688

GUSTAVE W. BORKLAND,

Appellee,

APPEAL FROM

v.

SUPERIOR COURT

L. A. GOODMAN MANUFACTURING CO.,
a corporation,

Appellant.

COOK COUNTY

345 I.A. 610²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant and counterplaintiff in plaintiff's action for an accounting of royalties under a patent license agreement, appeals from a judgment striking and dismissing its amended counterclaim seeking judgment against plaintiff for \$14,490.93--royalties previously paid under the license agreement, and \$4,000 previously paid under an agreement alleged to have been executed "as a condition precedent to the grant of said License Agreement."

The license agreement, dated October 1, 1948, covered six patents, four patent applications, and all letters patent issuing on said applications and all other letters patent and patent applications upon any subject matter of the letters patent and patent applications specified or any improvements thereon--all hereinafter referred to as Borkland patents. The license was declared to be a non-exclusive, non-divisible license, and to expire upon the expiration of the last of the patents designated. Defendant filed an amended answer in which it denied in paragraph 10 that it is making or has made, used or sold any articles embodying or made in accordance with said Borkland patents, and

-2-

alleging that it sells articles which it makes wholly in accordance with the teachings of the prior art. In paragraph 11 it alleged that the license agreement is void and unenforceable in that plaintiff fraudulently induced the Commissioner of Patents to grant plaintiff Patent No. 2,442,338, included in the license agreement; and, to reissue it as Reissue No. 23,171 on November 29, 1949, contrary to the provisions of the statutes pertaining to the Patent Laws of the United States, by stating under oath that the subject matter covered had not been in public use more than one year prior to the date the application therefor was filed in the United States Patent Office, although plaintiff well knew at such time that the claimed invention had been in public use more than one year prior to the date of the filing of the application. In paragraph 12 it alleged that the license agreement is void and unenforceable in that although plaintiff well knew the matters alleged in paragraph 11 of the amended answer, he concealed them from defendant and thereby fraudulently induced defendant to enter into the agreement by representing that he was the lawful inventor and patentee of the Borkland patents. Counterplaintiff adopts and incorporates the three paragraphs above mentioned in its amended counterclaim, and alleges in paragraph one thereof the payment of \$14,490.93 for royalties purportedly due under the license agreement. In paragraph 2 it alleges that on to-wit November 8, 1948, and prior to the grant and actual execution of the license agreement, and "at

-3-

plaintiff's demand as a condition precedent to the grant of said License Agreement, defendant was wrongfully and unlawfully induced by plaintiff to execute an obligation to plaintiff in the sum of \$5,226.66, *** and that defendant has paid to plaintiff the sum of \$4,000 on account thereof." It is further alleged in the amended counterclaim that said sums were paid to plaintiff through inadvertence, accident and mistake by reason of the matters set forth in paragraph 10 of defendant's amended answer, and that plaintiff ought not to retain said sums by reason of the fraudulent acts of plaintiff as set forth in paragraphs 11 and 12. On motion of plaintiff paragraphs 11 and 12 of the amended answer were stricken and the amended counterclaim was stricken and dismissed.

Counterplaintiff's claim is based upon an alleged fraud upon the patent commissioner or patent office through the alleged false affidavit to the effect that the subject matter covered by the patents had not been in public use more than one year prior to the date of the application for the patents. Plaintiff and counterdefendant insists that counterplaintiff is estopped to deny the validity of the patents covered by the license agreement, unless, as stated in 69 C. J. S. at page 621, "*** a statute or broad public interest conflicts therewith, as, for instance, where the license agreement contains illegal price-fixing covenants." Counterplaintiff concedes the general rule of estoppel of a licensee of a patent, but contends that under the principle announced in the cases of Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, and Shawkee Mfg. Co. v.

Hartford-Empire Co., 322 U.S. 271, the exception to the rule of estoppel has been extended to cases of fraud in the procurement of the patents or in procuring decrees of court establishing the validity of the patents. The principle underlying the rule of estoppel of a licensee is similar to that governing the estoppel of a tenant to deny the title of his landlord. This rule of estoppel was applied by the Supreme Court of the United States as early as 1855 in the case of Kinsman v. Parkhurst, 18 How. (59 U. S.) 289. The last case brought to our attention is Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U. S. 827, decided in 1950. In no case brought to our attention has the Supreme court extended the exception beyond cases wherein the license agreement contained price-fixing provisions which could be sustained only under the monopoly granted by a valid patent. See Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U. S. 394, Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, Scott Paper Co. v. Marcalus Mfg. Co., 326 U. S. 249, and Lanova Corp. v. Atlas Imperial Diesel Engine Co., 55 A.2d 272. An extension of the exception to the rule of estoppel to the fraud charged here would render every license agreement subject to attack in every case in which the priority of the invention might be questioned. In the absence of a ruling by the Supreme court extending the exception to cases similar to the charges of fraud in this record, we must hold that the rule of estoppel applies.

-5-

The court properly struck the counterclaim and entered judgment for counterdefendant.

The judgment is affirmed.

AFFIRMED.

Burke, P. J., and Friend, J., Concur.

45703

LANDFIELD FINANCE COMPANY,
a Delaware corporation,
Appellant,

v.

REGAL PAPER BOX CO., a cor-
poration,
Defendant.

RALPH L. SHORR and HYMAN
HORVITZ
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

345 I.A. 611

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order striking its amended statement of claim as to the two individual defendants, Ralph L. Shorr and Hyman Horvitz, and dismissing the case as to them. Defendants have not followed the appeal.

The amended statement of claim alleged that plaintiff had loaned the corporation defendant, Regal Paper Box Co., moneys amounting to 80 per cent of two certain accounts receivable, for \$109.07 and \$109.98 respectively; that the individual defendants are officers and agents of the corporate defendant and that they individually deposited or caused to be deposited money or checks received in payment of the above accounts in the bank account of the corporate defendant, well knowing that the money or checks had been assigned to plaintiff and were the property of plaintiff. The individual defendants as officers and agents of the corporation are liable for any tort of the corporation in which they participate. Lowell Hoit & Co. v. Detig, 320 Ill. App. 179. A cause of action against these defendants was stated in the amended statement of claim.

The order is reversed.

ORDER REVERSED.

Burke, P. J., and Friend, J., Concur

RESERVE BOOK

This reserve book is NOT transferable and must NOT be taken from the library ~~anywhere~~ ~~except for overnight use.~~

You are responsible for the return of this book.

DATE	NAME		
	Sgt. J. J. [unclear]		1/15
	641-1302		
2/19/79	Sandusky	203	740
2/20/79	S. Allen	726	6611
3/22/	Paul Hanson	770	0011
6-27	A. HIGUERA	726	3005
7-13	McGuil B	876	7964
11-9	AM Calacci	558	5740
3-27	B. Palmatis	368	9500
8-4	S. Spector	346	7400

